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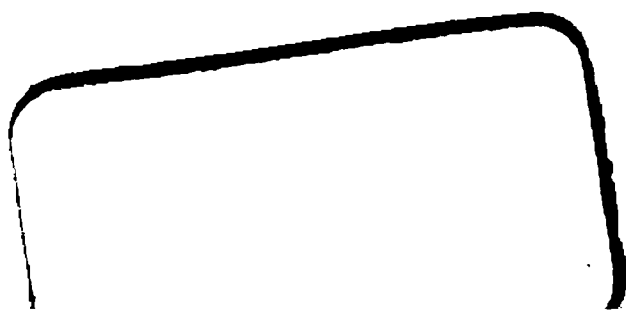
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*Chas. Wingate  
Stirling*

THE

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# THE JOURNAL OF JURISPRUDENCE.

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## THE LIABILITY OF EMPLOYERS.

A SYSTEM OF INSURANCE BY THE MUTUAL CONTRIBUTIONS OF MASTERS  
AND WORKMEN THE BEST PROVISION FOR ACCIDENTS.

*Being an Address to the Glasgow Juridical Society on the opening of the  
33rd Session, 7th November 1879.*

BY THE HON. LORD SHAND.

A NUMBER of years ago I had the pleasure of delivering the opening address of the Session of the Glasgow Juridical Society. On that occasion I endeavoured to lay before you the views and objects which I thought should actuate the members of the Society, particularly the younger members, in seeking to attain eminence and distinction in the high profession to which most of you belong, and at the same time to gain the full advantages of members of the Society, and to promote its usefulness and prosperity. On this evening, having been left free as to the choice of a subject, I have determined to select one particular topic which appears to me to have a peculiar claim on the interest of the legal profession. I mean to direct your attention to the law of Liability of Employers for accidents occurring to their servants in the course of the employment, and to state the reasons which have led me to the conclusion that an extensive system of Insurance, in which Masters and Workmen should combine to contribute, would form the true remedy for those distressing evils of a pecuniary nature which too commonly attend the occurrence of such accidents.

I believe you will agree with me that this subject is worthy of the best attention and consideration of every member of the legal profession, using that term in its widest sense, as embracing all who are engaged either in the administration of the law, or in the pursuit of law as a profession; and not least, those who are often called on for advice in the adjustment of contracts of service between masters and servants. Employers engaged in business attended with perils to those in their service, and servants in such

employments, have no doubt a more direct personal interest in the questions to be considered; but the legal profession have probably the best opportunities of observing how the existing law operates in all the departments of great manufacturing enterprise and other employments in which accidents are of no uncommon occurrence. They are unaffected by considerations of personal interest arising out of liability from any such cause; and masters and workmen alike may fairly appeal to them to assist in the settlement of those questions which have arisen and come recently into prominence as to the policy of the existing law, and the best way of meeting, as far as possible, the calamitous consequences which accidents to workmen so often entail. If it be necessary to say more to show that the subject is suitable for the consideration of such an Association as the Glasgow Juridical Society, I may remind you that within little more than a year it has been discussed at two meetings of the Law Amendment Society of England. On the former of these occasions, when, at the request of the Committee of the Society, I had the honour of presiding, the meeting was fully attended by members of the legal profession, members of Parliament, and representatives of employers and employed. An able and instructive paper was read by my friend Mr. Joseph Brown, Q.C., and followed by an interesting discussion. At the later meeting, held in the end of April of this year, when Mr. Thomas Brassey presided, the various bills introduced into Parliament on the subject last session were discussed; and such of you as may desire it will find a record of the papers and the discussions which followed, in the printed Proceedings of the Association.

#### THE EXISTING LAW.

It will not be necessary to say much by way of statement as to the existing law, for you are doubtless more or less fully acquainted with it. A master is always responsible for injury to his servant resulting from personal fault or negligence, so that, if from motives of economy, or from disregard of ordinary care and precaution, he uses defective machinery or employs incompetent workmen, and an accident occurs in consequence, he is responsible for the result. On the other hand, in the absence of personal fault, he is not responsible for the fault or negligence of a fellow-servant of the injured person; and the term "fellow-servant" is not limited to persons in the same grade of employment, but includes all of any degree, inferior or superior, up to a general manager, to whom the uncontrolled management of an undertaking is intrusted,—and again, is not limited to persons in the same department of work, but includes all who are members of an organization of labour for one common end, and subject to one general control, even although employed in different departments of duty, and it may be at a distance from each other. The leading authorities on the subject

are the well-known cases of *Wilson v. Merry & Cunningham*, decided in the House of Lords in May 1868, and *Woodhead* against *The Gartness Mineral Company*, decided in the Court of Session on 10th February 1877. The later of these cases was disposed of by seven Judges; and the opinions contain, I think, as full a discussion of the general principles on which the law rests as is to be found in any case that has occurred for decision in this country or in England.

The disputed question whether there was formerly a difference between the law of Scotland and that of England is a matter of historical interest only, for the law in both parts of the kingdom is now undoubtedly the same. It is no doubt true that, for some years in the progress of our law, in the course of the decision of questions of liability, certain eminent Judges stated that the principle by which it was held that a master was liable to strangers for injury caused by the act of his servant, was, in their opinion, equally applicable to a case of injury occurring within the circle of service; and it may even be said, as stated by the Dean of Faculty, Mr. Fraser, in his work on "Master and Servant," that for a time the understanding of at least a majority of the bench and bar in Scotland was to that effect. The question, however, was one of general principle, and there is nothing to support that view in any Institutional writer. The law, if it existed to the effect stated, rested entirely on *dicta* and decisions subsequent to 1839, when the case of *Sword v. Cameron* occurred, and prior to the decision of the case of *Reid v. The Bartonshill Coal Company* in 1858. None of these *dicta* or decisions had received the approval of the House of Lords as the highest Court of this country; and on the first occasion on which the question was taken by appeal to that Court, the law of Scotland was authoritatively declared and settled. If there had been either authority of weight in our Institutional writers, or a long series of decisions fixing the law on a principle different from that which, on broad grounds of universal application, had received effect in England and America, it might have been successfully contended that there was a difference in the law of Scotland. But this was not so. The judgment of the House of Lords, delivered by Lord Cranworth, in the case of *Reid v. The Bartonshill Coal Company*, deals successively with all the decided cases which had occurred after that of *Sword v. Cameron*, and including that case, and it is there shown that none of these decisions involved the affirmance of the general principle for which the representative of a deceased servant in that case contended. It follows, that although a doctrine different from that which has now been acted on for many years had for a time the declared approval of certain eminent Judges, yet in no proper sense can it be said that it ever was the law of Scotland that a master was liable to his servant for injury sustained through the fault of a fellow-servant, in the same way as he was and still is liable to a stranger.

## OBJECTIONS URGED AGAINST THE LAW.

In recent times the law has been assailed in various quarters. It has been said to be unsound in principle. And again, it is said that, even if it be admitted that a master free from personal fault should not be responsible to his servant for the fault of a fellow-servant, yet this rule ought not to include amongst fellow-servants persons in authority over others, especially those occupying the position of general managers or superintendents, nor persons acting in different departments, and it may be under different contractors, although all working towards the same end.

Probably the most formidable criticism of the existing law has proceeded from Mr. Lowe, who was chairman of a committee of the House of Commons which reported in the session of 1877 on the questions, Whether it was expedient to render masters liable for injuries to their servants by the negligent acts of managers, foremen, and others having a general superintendence of workshops and works? and Whether the term "common employment" could be defined more clearly than by the law as it at present stands? Mr. Lowe's opinion, embodied in a draft report which he proposed for the acceptance of the Committee, and to which he has otherwise given public expression, is, that by the law which Judges have laid down "bit by bit" since 1838, a body of jurisprudence has been created by which working men have been deprived of their right to compensation. Any view entertained by one of so much learning and so great reasoning power is entitled to the utmost respect and consideration. But I venture to think it will be found that the law, as it has been matured in this kingdom and in America by Judges of great learning and experience, rests, as it professes to do, on sound general principles, and that the argument to the contrary effect is based on a fallacy.

It is necessary that the question, Whether the existing law is founded on sound principle, should be shortly considered. I have to deal with the question whether an extensive system of insurance, in which masters and workmen should combine to contribute, would not be the true remedy for the pecuniary distress caused by accidents in hazardous employments. If the law has not principle to sustain it the remedy for at least a large class of cases would be to set aside that body of jurisprudence which is to be found in the decisions of the last forty years and upwards, and to enact that employers shall be liable for the fault of fellow-servants.

The argument against the law is fallacious in assuming that, by the decisions which have built up the law, servants were deprived of a previously existing legal right. Servants never had any right to compensation from a master, who was himself free from personal fault, in respect to injury sustained through the act of a fellow-servant. The earliest case in which such a claim is recorded as having been made in England is, I think, that of *Priestly v.*

*Fowler* in 1837, and the claim was then rejected. In that case a servant travelling on his master's van sued on account of injury sustained through the fault of the van-driver. Lord Abinger, in delivering the judgment of the Court of Exchequer against the plaintiff, said, "It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles;" and, on the general principles stated, in a careful judgment in which the alarming and anomalous consequences of sustaining such an action were pointed out, it was held there was no legal claim against a master not himself in fault. The same general principles have regulated and guided the whole course of jurisprudence in the subsequent administration of the law by Judges of the highest eminence, including the Judges of the Court of last Appeal.

It has been explained by some of those who assert that the servants' right to compensation has been taken away by decisions of the Court, that what they mean is, that a general principle had been fixed in the law, by which masters were held responsible for the neglect or fault of their servants in questions with third parties, and that the Court was bound to carry out that principle when the injury complained of occurred not to a stranger or third party but to a fellow-servant. There are several conclusive answers to this reasoning.

In the first place, the general rule referred to was itself introduced by judicial decision. It has, in my opinion, no foundation on sound principle, and is not supported by the early jurists or Institutional writers. The maxims *Qui facit per alium, facit per se*, and *Respondeat superior*, which belong to the law of mandate, have their true application only with reference to acts which have been expressly authorized, or which are the proper result of implied authority given by the principal. It is a misapplication of these maxims to give them effect so as to hold the master or principal responsible for the fault of his servant, committed without his authority, and it may be against his instructions. To take the instance most familiar, because it is of common occurrence: if a coachman—chosen because of his experience and character for steadiness—having received general directions to drive carefully and at a moderate pace, should by carelessness run over a passenger on the road, there is now a very general concurrence in opinion that, although the law is otherwise, there is no good reason for holding his master responsible in consequence. The true principle applicable to cases of that class, is that of *Culpa tenet suos auctores tantum*. I cannot now enlarge on this point, but you will find it fully discussed in the case of *Woodhead*, to which I have already referred. I must notice, however, what is said on the subject by the Commissioners, to whose report I have already referred. The report adopted by the Committee contains the following statement:—

That a man should be liable for injury occasioned by his own act, neglect, or permission is obviously just. That a man should be liable for injury occasioned by acts which he has neither done nor permitted, which have resulted from no neglect of his, or in disobedience to his order, or which he may have forbidden, is a result the justice of which it is not easy at once to recognise, and one which some eminent lawyers do not hesitate to describe as essentially unjust. Such however is, and since the reign of Charles II. appears to have been, the law of this country as to injuries occasioned by servants in the course of their employment to persons not in the same employment. For such injuries the master employing the servant is liable, notwithstanding that the acts which occasioned them may not have been ordered or authorized, or may even have been forbidden. There is a strong concurrence of authority against the justice of this law, though there seems to be some difference of opinion as to its origin and historical development.

The report prepared by Mr. Lowe, the chairman of the Committee, which was not adopted on other grounds, is to the same effect. Mr. Lowe there says—

The maxim *Qui facit per alium, facit per se*, seems intended to meet the case where a person who has really caused the mischief seeks to defend himself on the ground that he does not appear prominently or personally in the transaction, but to have no application to cases where the spring and origin is in the servant. The law is, however, perfectly well settled. It appears to have been the creation of the Judges, and certainly did not err on the side of showing too much consideration for the rich as against the poor. The question was undoubtedly surrounded with great difficulty. The false principle involved in the decision which declared the master liable for the misconduct of his menial servant, with which he had nothing to do, at last bore its natural fruit.

And he then refers to the attempt made to extend that unjust principle, so as to apply it even in the case of injuries to fellow-servants.

Assuming then that the principle in its application in a question with strangers or third parties is unsound, and that the rule was the creation of judges, it seems to follow that when the attempt was made for the first time in 1837 to apply the same rule within the circle of service, it was wise and right of the Judges of that time to decline to carry the operation of the rule into a new field. The decisions previously had operated injustice in questions with strangers. There was no sound reason which should require Judges, by a new line of decisions, to cause further injustice by giving effect to the same principle in questions between a master and his servants. It has been said that the case of *Priestly v. Fowler* introduced "a bad exception to a bad law." But if it be conceded that the law was bad, it is not easy to see how the exception can be otherwise than good. On the assumption that the principle of the law was unsound, the Judges who had introduced the law were surely warranted in declining to extend its application.

But in truth, even if the general rule could be defended as being sound in principle, the exception or limitation to its operation has also sound principle as its basis. Where a person is a stranger it may be said he ought to have a remedy against a master for the fault of a servant, because, as a stranger, or one of the outside public, he has been subjected to risks without his consent. This observation does not apply to persons who voluntarily enter an



employment, and by so doing incur risks of a kind naturally incident to their position.

To conclude what I have to say on the existing state of the law, and the principles on which the law rests, I must observe that Mr. Lowe, who so strongly maintains that judicial decisions should have applied the same principle in questions with fellow-servants which had been in force in questions with strangers, with some inconsistency, as I humbly think, declines to follow out this view to its legitimate consequences. For in his report he indicates a clear opinion that a master should only be liable to servants for injury sustained through the act, not of all other servants of the master, but only of those in a position of authority. The report prepared by him is thus expressed on this subject:—

The Committee therefore recommend that the funds of every industrial undertaking shall be liable to compensate any person employed in such undertaking for any injury he may receive by reason of the negligence of any person exercising authority mediately or immediately derived from the owners of such undertaking, with this qualification, that the liability to indemnify shall not extend to persons who, though exercising authority, are *bona fide* employed in actual labour as distinguished from superintendence.

If the general principle ought to have effect, it is difficult to see on what ground the master should escape liability for the fault of a fellow-servant in any grade.

#### PROPOSALS TO ALTER THE LAW.

Since the report of the Committee there have been various proposals for the alteration of the law. With the limited time at my disposal I can only briefly notice these. The most sweeping measure has been put forward by one of the members for Stafford, who, by a bill introduced into Parliament, has proposed to make masters liable for injuries sustained by their servants to the same extent as in the case of injuries to third parties. What has been already said is sufficient to show that such a measure is directly at variance with sound legal principle. The proper incidents of the contract of service are on the one hand employment and wages given, and on the other duty undertaken. If the service be attended with unusual risk, the workman is entitled to have this taken into consideration, and this element must, no doubt, along with the advantages and disadvantages otherwise of the employment, enter into the question of wages or remuneration given. The proposal to subvert the existing law by so sweeping a change would add to the obligations of the master—himself guilty of no personal fault—an absolute guarantee against the fault of fellow-servants however carefully chosen. Thus, in the working of a mine, if a master should provide his men with Davy lamps with an injunction that no key which can open the lamp shall be taken into the pit, yet if a servant, in disobedience of this regulation, should surreptitiously take a key with him to his work, and open his lamp to enable him, in disobedience of another regulation, to smoke his pipe, and an



explosion should result, the mine-owner would suffer not only the loss, it may be, of a large amount of capital in the destruction of the workings, but be liable in compensation for the loss of life or injury to the persons, it may be, of hundreds of miners. This statement, by way of illustration, of the consequences which would result from such a radical change in the law seems to be enough to demonstrate the unsoundness of the principle on which the proposal for such a change is made. But it suggests, further, how impolitic the change would be even in the interest of workmen themselves. Manufacturing and mining enterprise are already sufficiently weighted in this country. If employers who have done their best to obtain careful and skilled servants, were by a new statutory law made liable to claims of damages for the results of faults committed even by such servants, the effect must necessarily be to deter men of capital from embarking in such undertakings. One serious accident might involve the mine-owner, or lessee, or manufacturer in ruin, especially when it is borne in mind that claims of damages for personal injury have always been a fruitful source of expensive litigation in the settlement of questions not only of liability but of the amount of damage. In so far as capital would be driven from such fields of enterprise the workman of course must suffer from the lack of demand for his services.

It is, then, not surprising to find that a large and important section of workmen have declined to give their support to a measure which seems to be so obviously opposed to public policy and so likely to cause injustice. At a meeting of the Amalgamated Society of Railway Servants—a body numbering last year 13,543, and having an annual income of nearly £10,000—which was held at Leeds on the 7th of last month, and was attended by a large number of delegates, Mr. Stewart M'Liver, the president of the Society, speaking of the measure of the member for Stafford, is reported to have said it was

a bill no one could seriously entertain. It was wild and visionary, and its only effect had been to damage and delay the object it professed to serve.

While the secretary, Mr. Evans, on the same subject said that the member for Stafford,

who in 1875 would only go in for a bill similar in character to the present Government bill, now went in for so extreme a measure, that those who supported him in 1875 were now compelled to say that they could not go so far as he proposed to go, for the course he proposed would be one of injustice, and would be such a tax on capital that industry could not be continued in this country.

Accordingly the meeting, giving effect to these views, resolved to support the bills of Earl Delawarre and Mr. Brassey, the general purpose of which is to make masters responsible to their servants for injuries resulting to them from the fault of persons placed over them in the service, or having authority to give them orders.

The bill introduced by the Government has been evidently drawn with the purpose of giving effect precisely to the report of

the Committee. It is thereby proposed to alter the law only so as to make a master responsible to his servants for the fault of a "servant in authority," which is defined to mean any person in the management of the works or undertaking, or of any distinct branch or portion thereof. The distinction between that measure and those of Earl Delawarre and Mr. Brassey appears to be this, that the latter would make a master liable not only for the fault of a manager but of any person to whose order or direction the workman was bound to conform. Of these bills I shall only say that their effect would be to make an employer responsible to his servant although he had been guilty of no personal fault or neglect. Their provisions appear to violate sound principle, and although the proposals are a long way short of those contemplated by the sweeping measure of the member for Stafford, the evils introduced would be of the same character though not of the same extent. If they should pass into law the master will add to the ordinary obligations of the contract of service a guarantee against the consequences of faults of one or more of the classes of his servants. He may thus be exposed to the risk of ruin from accidents resulting in large pecuniary claims and legal expenses.

It may be questioned, however, whether such a change of the law would be attended with very extensive practical consequences. For it is to be observed that by none of the bills laid before Parliament was it proposed to interfere with the liberty of contract. A proposal to that effect made before the Committee who reported on the subject was negatived, and had the support of only two votes; and the report prepared by Mr. Lowe contains a strong expression of opinion against any such provision. It may be anticipated, therefore, that if any such measure, even in a modified form, became law, those who are now interested in carrying on manufacturing and mining undertakings throughout the country would stipulate that persons entering their employment should not be entitled to hold them responsible for anything beyond personal fault.

#### REMEDY FOR EXISTING EVILS.

Having said so much of the law, and the proposals for its amendment, I have next to consider the question—Where then is to be found a remedy for the pecuniary loss which unquestionably so often deepens the distress attending the occurrence of accidents to life and limb in the course of dangerous employments? There can be no doubt that a very great amount of privation and suffering is caused to the unhappy victims of accidents who are rendered unfit temporarily or permanently for further work, and also to their wives, families, or dependent relatives; while if an accident result in death, a widow and children are too often left entirely without any provision, and have to endure not only the loss of the head of the family but the pangs of want. It has been

often said by those well acquainted with the statistics on the subject, that appalling as are such occurrences as the Hartley Colliery or the Haydock accidents in England, and the Blantyre accident nearer our own doors, in the amount of privation and misery to which a large number of persons are suddenly subjected, yet, after all, by far the greater number of accidents are of a kind of which little is heard, and in which one or two victims and their families are the sufferers. It has been ascertained beyond question that accidents, occurring for example to miners from falls of the roofs in their working-places, to shunters in the employment of railway companies, to persons having the care of boilers, and to those engaged in similar employments, make up much the greater percentage of such unhappy occurrences. These accidents attract comparatively little notice, and it too often happens that the only help which the sufferers can obtain is from the contributions of a small circle made acquainted with the occurrence, and including generally the employer in whose service the accident has happened—contributions of but small amount to meet the necessities of the case.

Every one will cordially agree in thinking that any means consistent with justice and sound policy that will alleviate such sufferings, ought to be encouraged and promoted, and I doubt whether any subject can be suggested more worthy of the attention and consideration of those who take an interest in that great body of workmen in this country, who in the course of their employment are more or less subject to peculiar dangers. Of one thing I am completely satisfied, and that is, that even if all the measures which have been proposed for the alteration of the law were to be immediately passed, while the evil consequences to which I have referred would probably result, only a small part of the pecuniary distress attending accidents would be alleviated. Some controversy exists as to the particular cause to which accidents are chiefly to be traced. There are some, though I believe they are very few in number, who venture to affirm that accidents are mainly caused by the want of skill and care in the management of manufacturing and mining undertakings. If any reliance is to be placed on the statistics of railway companies this view is unsound, for the great percentage of accidents, for example to shunters and others, recorded in the returns kept by these companies, are traced entirely to other causes; and it is difficult to believe that those who are conducting large undertakings, and who often suffer great loss in plant and capital by accidents, as, for instance, through collisions on railways or explosions in mines, should habitually carry on their business on a system of bad management. I believe that even if a master were held responsible for injuries caused by the fault of all fellow-servants, this would give the remedy of a claim in but one out of five accidents that take place. The truth is that the great majority of such occurrences are what are called popularly

“unavoidable accidents,” which must occur because they are the natural incidents of the employment; often, it may be, the result of slight thoughtlessness, carelessness, or neglect on the part of the unhappy sufferer, who is, as I think, not the less entitled to sympathy on that account. *None of the legislative measures proposed would in the least degree meet the pecuniary evils which attend these, which I believe to be by far the largest class of accidents.* There appears to be one remedy, and one only, which can be resorted to, and that is an extensive system of insurance. I have come to the conclusion, after the best consideration, that, on grounds of clear expediency, the basis of such a system ought to be mutual contributions by employers and workmen; and that while on the one hand the contribution of the employer to that object should be really substantial, he might in return be relieved from claims of compensation. May I venture to hope that if you should agree with me in this general view, you may be induced, each in your own circle, and according to your opportunities, to use your influence to promote and extend such a scheme as I refer to?

The view I now suggest for your consideration has not the merit of novelty. It has the advantage indeed of having been tried successfully, as I shall presently show by instances and illustrations. But the system of thus providing against accidents in dangerous trades is but in its infancy. It should be greatly improved and extended where it exists, and should be introduced in many quarters where it is unknown. Everything that can be done in the way of making such a system known and of extending its operation will help to diminish much human suffering.

In the case of the workman the advantages are direct and obvious. Thrift and prudence will not enable him by himself and from his own wages only to lay up a fund to meet the contingencies of a perilous employment. His weekly or annual savings would not be sufficient for this purpose. But if the large body of workmen engaged in the same trade will combine to make constant and regular contributions, a fund may be provided which would be sufficient to meet the case of accidents to individual contributors, and, as I shall immediately show, a contribution of small amount will be enough.

To the employer, again, there is also much advantage. When an accident occurs the claim would be directed not against him but against the fund to which he had contributed. In place of liability for claims so large that they might involve the loss of years of profit, or even his ruin, and for the expense of litigations no part of which he could in any case expect to recover, he would only have to provide an annual defined sum, which he could measure and estimate, and which would form a charge on the gross proceeds of his business. He would purchase relief from a constant source of anxiety by an annual payment of definite, though it may be of substantial, amount. I believe, however, that the necessary contri-

butions would form a small item in an annual balance-sheet; and the employer would not be subject, as at present, even to those claims now so frequently made on his benevolence, and which are generally irresistible because of the clamant and necessitous circumstances of the applicant. It would be a strong inducement to workmen to enter any particular service that the master gave material aid to provide a substantial insurance fund.

It appears to be only reasonable that if the conduct of a trade be attended with peculiar perils, the master and workman should, by a joint provision of this kind—which is not open to objections on the ground of injustice to any, or to the charge of being opposed to public policy—provide for those accidents which must occur, rather than throw the consequences on the general rates, which are levied from those liable to contribute according to the value of property only, and without relation to such peculiar perils. The result in the end would be to make the particular trade bear its own proper burdens, and at the utmost to raise the sale price of the article manufactured to the trifling extent represented by the contributions of masters and men to an insurance fund,—an extent which in most cases would be scarcely appreciable in the price.

Another advantage of such a system, perhaps not less than any I have mentioned, would be the creation of a bond of union, of sympathy, and kindly feeling between masters and men, which it should be the object of all, as far as possible, to promote.

It would, no doubt, be necessary in such a scheme where premiums are paid to cover or provide for certain risks, that a maximum should be fixed as a limit to claims in the case of death, and a certain rate of weekly or monthly allowances be fixed in cases of disablement only. But many will agree with me in thinking that this is no disadvantage, for one of the most obvious evils which attend those cases in which the law now gives compensation (as every one connected with the administration of the law must know) is the difficulty that arises in controlling the large claims that are made, and in assessing damages on some reasonable principle.

Insurance has in practice been effected in two ways—the one being by contributions to provident and accident funds, and to friendly societies, in which the management lies mainly with the workmen themselves; the other by the payment of premiums to an insurance company. The former of these courses has been most extensively pursued in this country, or, I should rather say, in England; and it certainly has the great advantage of economical and careful management, and by a body fairly vigilant in the detection and suppression of claims not well founded. Many of you may be aware of the extent to which this system, growing as it has done year by year, is carried out in England. It has, I believe, been developed chiefly in some of the mining districts, and in the working of some of the large railway companies. Interesting



information, with details on this subject, will be found in the Fourth Report of the Commissioners of Friendly Societies, presented to Parliament in 1874, founded on very full inquiries and evidence. The Northumberland and Durham Miners' Permanent Relief Fund, which some years ago had comparatively very few members, had last year a membership of about 70,000, while the number of persons in the mines of the district was not more than 105,000. The objects of the society, as stated in the rules, are—

To provide, in case of fatal accident, for the widows and children, or other dependent relatives of the deceased; and in case of accidents not fatal, but where the member is permanently disabled, to make suitable provision for him; also a payment in case of fatal accidents to the relatives of the deceased for the purpose of defraying funeral expenses.

The miners contribute each about 3d. per week to the funds, and upwards of one-half of the owners of the collieries give voluntary contributions, which it is expected should amount to 20 per cent. on the contributions of the men. The contributions of the members are, to a very large extent, deducted from their wages, and the society was last year paying annuities to 280 widows and 550 children by way of compensation for accidents. The payment of 2d. per week by each member has been found sufficient to secure to a man's widow and children in case of his death by accident a pension of the value of £160, and in case of permanent disablement by accident an allowance of 8s. per week, and for temporary disablement 6s. per week. In the great lead mines of Northumberland and Durham similar societies exist.

Again, in the evidence of Mr. Alfred Hewlett before the Committee to whose labours I have so often referred (Mr. Hewlett being the managing director of the Wigan Coal and Iron Company, which employs 10,000 work-people, and has raised nearly two million tons of coal per annum), an account is given of a similar society called the Lancashire and Cheshire Miners' Permanent Relief Society. It is managed by eight ordinary and six honorary members, the former being persons employed in or about the mines in the district, and the latter persons subscribing £1 annually, or a life donation of £10, and all coal-owners who subscribe 10 per cent. on the amount paid by members employed by them. It is worked by local agency connected with the different collieries. The contributions of miners are 3d. per week, and the benefits 8s. a week in the case of accidents disabling from work, in addition to medical attendance or relief at the hospital or infirmary. In the case of fatal accidents, again, the sum of £5 is given to the widow or relative of each married member—the widow receives 5s. a week so long as she remains a widow and conducts herself with propriety, and the children's allowances are 2s. 6d. a week, and sometimes upwards, until the sons attain the age of twelve, and daughters thirteen years. The ordinary revenue of this society in 1876 was upwards of £16,000, the expenditure under £13,000; and the

available balance, exceeding £11,000, was invested in public securities. Mr. Hewlett in his evidence says:—

I venture to suggest that such a society forms a bond of union between employers and employed, prevents litigation, and, above all, makes it the interest of every member to see that discipline and rules for safety are properly carried out and obeyed, and it is worth considering whether it would not be desirable to make such provisions compulsory both on employer and employed.

Again, Mr. G. Fereday Smith, chairman of the Mining Association of Great Britain, in his evidence expresses a similar view. "Personally," he says,

(I speak of my own individual opinion here, but I have thought a great deal about it), I should welcome a legal enactment constituting either for the county or district, or even for the colliery, a benefit society based upon a rate per man or boy employed, to which the owner should be compelled to contribute weekly a fixed percentage, and to which every person employed in the mine should be compelled also to contribute; and the master should not be allowed to employ any one who did not contribute. The fund should be managed by a joint committee of master or manager or work-people, and it would be the direct interest of every person in the mine to prevent his neighbour from doing what might cause an appeal to this fund.

It is, I think, greatly to the credit of the shipbuilders on the Clyde, that many, if not all, of them have for some time had Accident Fund Societies, to which, while the workmen must subscribe, the employers also contribute. In one instance—and I refer to one of the firms in largest business on the Clyde—the employer's contribution is of equal amount to the contributions of the men—a circumstance of very uncommon occurrence, I fear—and very substantial assistance is given if an accident should occur.

Again, in regard to Railway Companies, the system of the North-Western Railway Company may be mentioned. That company has about 45,000 men engaged upon the railway, of whom 24,000 are engaged in the actual conduct of traffic. In connection with the staff there is both an Insurance and Provident Society—that is, an Insurance Society for providing assistance in case of accidents, and a Provident Society for cases of sickness. The contributions of the men to the Insurance Society vary from 1d. to 3d. per week, according to the class of workman, and to the Provident Society from 2d. to 4d.; and these contributions are retained out of the wages with the consent of the men. The society is managed chiefly by the men themselves, with some assistance of certain of the superintendents in a higher degree in the service. The Company contributes to both societies about £2300 a year, and all the fines imposed on the men for neglect of orders or otherwise in the course of the year are paid to the society. In the case of death, sums varying from £20 to £40 are paid. In case of permanent disablement sums of from £25 to £35; and during temporary disablement sums of 12s. to 18s. a week for six months, and half of that amount for six months thereafter. Other instances might be multiplied. The Great Western Railway Company, for example, pays upwards of £6000 a year towards provident funds and superannuation funds; and the Midland Railway Company and London and South-Western Railway Company make large contributions to



the friendly societies of their employés. To come nearer home, I believe the North British Railway Company give an annual payment to a friendly society of their employés, though I rather think the amount is under 10 per cent. of the amount contributed by the men. It may be that some of our other companies adopt a similar course; but if so, it is not, I believe, to any large amount.

The experience of such societies satisfactorily shows that a contribution of 3d. a week made by a large number of employés in any trade in a populous district towards a fund to meet cases of accident would give a very substantial return, and the amount would be of course substantially increased by the contributions of employers, which in many cases might, I think, well be fixed at a sum equal to the contributions of the men.

A practical difficulty might present itself at the outset in many cases, because of the existence of permanent sick funds intended to cover cases of sickness as well as accident. There are sufficient reasons for saying that there is not the same call on masters to contribute to a sick fund as to a fund to provide for accidents. But this is a matter of detail. Provided the amount asked by way of contribution from the employers is a sum which may fairly be regarded as a reasonable contribution on their part towards an insurance fund to meet the case of accidents, it would be matter of arrangement whether these contributions should be paid into a separate fund for accidents,—which would seem to be the best course,—or paid to a general relief fund.

It is worthy of being mentioned here that so long ago as 1865 the German Government, by a general enactment, still in force throughout the Empire, required that in every mining district there should be a friendly society, the constitution of which must be approved of by the public local authorities, and that employers and workmen must all join the union or society. The workmen are required to make fixed payments to the society, which are retained from the wages, and employers must contribute at least one-half of the payments made by their men. In case of accident, payments or allowances to the sufferer, and if the accident be fatal, then to his wife and family, are given, as in this country, and I am informed the law works admirably in the relief of distress. A compulsory system was adopted only because it was found that a voluntary provision of the same kind was resorted to only in a limited number of cases.

I am not aware that the insurance of large bodies of workmen against accident in Accident Insurance companies has been practised to any extent in this country. But it is otherwise in Germany, where the practice is extensively followed. By an enactment of the German Parliament passed on 7th June 1871, employers in mines, quarries, and manufactories were made liable for injuries resulting from the fault of any general manager or representative, or any one intrusted with the conduct or superin-

tendence of the work or workmen. The law then enacted did not render the employer responsible for the fault of servants not in authority, and, so far as I have been able to learn, it has never done so. Nevertheless it has been for some years a common practice in Germany for employers in trades attended with risk of personal injury to effect a general insurance of all their workmen by payment of an annual premium, and to require all workmen entering their employment to make a contribution, which is deducted from their weekly wages. In the case of one large mining company, the particulars of which have been furnished to me, the annual provision for an insurance in 1878, covering 500 men, was £350, representing about two-fifths per cent. on the gross wages, and each workman earning in wages £50 a year, paid about 7d. a month only, or 7s. a year. In case of accidents a substantial return was given—1s. a day where the workman is temporarily disabled, £20 a year if permanently disabled, and a much larger sum to his family in case of death. The progress and extent of such insurances is stated in detail on pages 248-49 of vol. v. of Walford's "Cyclopædia of Insurance," now in the course of being published. As an illustration of the progress of such insurances, it may be mentioned that the Allgemeine Unfallversicherungs Society in Leipzig in 1872 had insured 3432 establishments, having 233,115 servants; while in 1876 the number of establishments insured had risen to 6540, with servants to the number of 327,760,—and this is but one of a number of different companies.

The facts now stated are sufficient to show that insurance against accidents, on the footing of joint contributions by masters and workmen, may be practically carried out either by what are called Friendly Societies, or by payment of premiums to public companies. I do not profess to say which is the preferable plan, though I believe the former will probably be found to be the best, because the management will be least expensive, the cases will be carefully investigated by the workmen themselves, with an interest to detect and stop ill-founded claims, while the year's profits will form part of the general funds, instead of being divided amongst a body of shareholders.

If that course should be adopted, it appears to me that, on the one hand, employers should contribute on a scale considerably higher than has been usual in this country, and certainly not less than one-half of the amount contributed by the men; while, on the other hand, it should be a condition that every workman joining an employment with others should become a member of the society and contribute.

Should such a system of insurance not be voluntarily adopted throughout the country after the lapse of a reasonable time, and the distress, so often consequent on accidents, continue because of the absence of any adequate provision by the sufferers, and should

the ratepayers be thus charged with the maintenance of persons injured by trade accidents and the families of those who are killed, it may well be considered whether a system of insurance should not be made compulsory on masters and workmen, as in Germany.

I do not despair, however, of the effect of voluntary efforts, and would fain hope yet to see employers generally take up the subject, and by substantial contributions induce their workmen to unite with them in providing insurance funds. There are not wanting signs amongst workmen themselves that if they are met in this friendly spirit a satisfactory solution of the present disturbing questions will be found. For example, only the other day it was announced that

An important movement, likely to result in the formation of a new South Yorkshire Miners' Association, is exciting attention among the mining classes. Several of the oldest and largest lodges in that section think there are too many strikes, and are taking steps to join the new association on a Friendly Society basis. Confidence is expressed in the formation of a strong union. A treasurer and president have been appointed.

This is probably but an indication of a feeling which exists in many other quarters; and, at all events, the feeling may be created if employers will invite their workmen to take joint-measures for providing for accidents, and thus to form a bond of union between employer and employed. It would be much better for workmen if they would unite with their masters to secure a practical benefit in this way, instead of keeping up a prolonged struggle of indefinite extent for an alteration of the law which, in any view, it will be difficult to obtain, and which, even if obtained, would not meet the existing evils, for the reasons I have explained.

The population of this great city and its suburban districts, according to the last authentic account of your able Chamberlain, is 740,000. If you add to this the mining and manufacturing districts of the county of Lanark and of Renfrewshire adjoining, I know not what the total population may be. The numbers of employers and employed in trade and business attended with risk to life and limb, must be estimated by hundreds of thousands; and no great commercial centre, therefore, could more properly originate and extend in all branches of enterprise such a scheme as I have spoken of. I should gladly see an association founded in Glasgow for this general purpose; and failing this, see societies supported by masters and men spring up in each branch of industry. You may not all agree with me in the views I have stated on the various questions with which, in the course of my address, I have had to deal. But at least I feel sure that you must be alive to the pain and distress which so often arise from the absence of provision for painful accidents on the part of the sufferers. I ask you to consider whether, consistently with justice and sound policy, a provision will not be most satisfactorily made by a system of insurance promoted by masters and men jointly, and founded on mutual con-

tributions; and if you agree with me, I again urge you to support and promote the extension of such a system to all perilous occupations, on a footing similar to that which has already been adopted in your great shipbuilding works on the Clyde, with such modifications and improvements as past experience may suggest.

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### MR. BOYD KINNEAR ON "THE COMING LAND QUESTION."

AMONGST the various tentative suggestions which are now being thrown out in all directions, and by all sorts of people, for the solution of the Land Question, it seems to me that sufficient attention has not yet been given to those contained in Mr. Boyd Kinnear's article in the first September number of the *Fortnightly Review*. Yet whether we desire to view the question from a legal, an economical, or a social point of view, few of those who have spoken of it can have higher claims to be listened to; for Mr. Kinnear combines the exceptional qualifications of a member both of the Scottish and the English Bar, of a Fife laird, and of a resident in one of the Channel Islands who has had practical experience in garden-farming. He is, besides, well known to the public as a writer on kindred subjects, of much originality of thought and fertility of resource, and one who is unusually free from those misleading influences of class and party, which act so powerfully on the majority of men. By those who despise all practical suggestions the moment that an attempt is made to base them on any ultimate principle, Mr. Kinnear will of course be dismissed at once as a theorizer. But the more judicious, even amongst practical men, may possibly reflect that it is by such means alone that any real progress can be made in new directions, and that it is only in the initial stages of such a discussion as this that these means can act with any practical result. The moment that the question enters the sphere of what are called "practical politics" it will be reduced to a struggle between conflicting interests and prejudices, and, if Mr. Kinnear himself should again become a candidate for the representation of his native county, he will have to ask himself, not what is the true solution, but what is the nearest to the true solution that will secure him the votes of the Fife farmers, or the support of the Liberal Association. His wisdom will be bounded by their intelligence. Let us see, then, what Mr. Kinnear has said before he mounts the party platform.

Without being by any means an advocate for the compulsory subdivision of property, or the artificial introduction of peasant-proprietors, he recognises the importance of converting nominal and fictitious into real and personal proprietorship. What, he asks, are the hindrances to capital and skill being employed, to the full extent that they might be, in the cultivation of the land? And

he answers—"Firstly, the existence of estates so large as to be beyond the power of satisfactory supervision by the owner in person. The limit of useful ownership might indeed not unreasonably be drawn at the line of profitable management by the owner farming in person, and it might very reasonably be urged that ownership and occupation ought not to be allowed to be severed. But, without proceeding to that point at present, it is unquestionable that estates so large as to need superintendence by agents cannot be deemed in the best position for cultivation. Land agents are, indeed, as a rule, very respectable men, and well qualified for their duty, and if they were themselves the owners would probably make excellent landlords. But not unfrequently they are mere lawyers, or other persons who have no real knowledge of what farming needs, and their functions are limited to drawing the rents and staving off any claim on the landlord for outlay. On the other hand, those who really understand what ought to be done are hampered by the necessity of obtaining the sanction of perhaps an absent, or indifferent, or impecunious landlord before it can be executed. Lastly, very large estates mean, as a rule, a very large income, which makes the owner careless whether the full capabilities of the land are developed or not" (p.307).

Neither in these remarks, nor in what he subsequently says of the evils resulting from settlements and entails, is there anything very novel. It is on the subject of encumbrances that Mr. Kinnear chiefly dwells, and it is in the remedy which he proposes for them that the real object of his paper comes out. "The burden of encumbrances on the land prevents a very large number of landlords from developing its capabilities. These burdens may be debts contracted by their ancestors or themselves, or they may arise from provisions made for previous generations of children. Whatever the source, the effect is to disable the owner. He is burdened with payment of a rent-charge which makes him virtually a mere tenant, while he has on his hands the responsibility and reputation of an absolute proprietor. The balance of income remaining to him is absorbed in maintaining that fictitious standard. He has a house proportioned to the gross value of the estate, not to his net receipts; he must keep an establishment corresponding to his house; his position in the county is determined by his acreage; his mode of living, his charities, his provisions for his own family, are all expected to be in proportion to what his possessions seem to be. True, it is generally known that a man is more or less encumbered, but there is a perpetual temptation, too strong for any but exceptional humanity to resist, to act up to appearances instead of to realities. Nor does the encumbrancer, who is the real landlord, share in the least degree the obligation of the nominal landlord. Whatever happens the encumbrancer draws his fixed income from the estate and gives nothing back to the estate. It is the nominal landlord who must meet, out of his own



pocket, all losses by bad tenants or bad seasons, and the harder the times, the more he is expected to be generous. In such circumstances it is impossible that he can lay out capital in improving the productiveness of the land. He simply does not have the means. The mortgagee, who has the income, has not the management. Under this divided system it results that neither does anything, till happily at last foreclosure becomes inevitable, and the estate passes into new hands to commence a new life" (p. 309).

Mr. Kinnear dismisses the partial substitutes for mortgages furnished by Government loans and by Lands Improvement Companies as limited in their action by the cost and cumbrousness of the machinery required, and by the further fact that they scarcely meet the exigencies either of landlord or tenant. "A landlord already burdened," he says, "will not assume more debt unless satisfied that his tenants will pay the additional interest, and it is not every tenant who will consent to pay a rate of interest which includes reimbursement of the capital, and thus involves a gift to the landlord.

"Such a method is therefore at best cumbrous, costly, and inadequate. The true remedy for imperfect farming must be found in some other method of obtaining capital for its improvement. There is only one method, and this is, that landowners should be freed from encumbrances. And to do this there is only one way, and that is that land should not be permitted to be a legal security for a debt. It is not meant that land should not, like other property, be liable to be seized and sold for the owner's debts, but it is meant that it should not be capable of being legally affected as security for one special debt to the exclusion of the owner's general creditors. In other words, mortgages should no longer be valid.

"The effect of this rule would be as regards the future, that a landlord desiring to raise money could do so only on his general credit or by sale of a portion of his property. The former resource would be occasionally available, just as it is to a merchant. Banks would probably discount a bill of a landowner, whose presumed credit was fairly good, but it would be only for temporary advances, and no one would readily lend to a landowner who was suspected of being seriously indebted. Sale of a sufficient portion of the estate to yield the sum required would therefore be the usual method of raising funds. As regards existing mortgages, it would be proper to make their validity cease at various dates, so as not to bring too much land into the market at once. This could be accomplished by enacting that the power of the mortgagee to foreclose should expire at a certain number of years after the date of the mortgage, or by other arrangements which will readily suggest themselves. The rule would apply equally to family provisions, and the result would be that in a moderately short period all the land in the United Kingdom would be held free from encumbrances" (pp. 311, 312).

For the further exposition of this ingenious, and to me at all events novel proposal, I must refer your readers to the article itself, but I shall venture to add a few words as to one of the leading objections which I feel sure will be urged against it, and the manner in which it occurs to me that this objection may be obviated. In dealing with the objects and effects of mortgages, Mr. Kinnear has confined himself entirely to the interests of the mortgager. That the mortgage is very likely to be ruinous to him, and through him hurtful to the landed interest, is true enough, though even that proposition ought not perhaps to be stated quite without qualification. Mortgages on house-property are often of the greatest benefit to mortgagers by enabling them to hold their houses as proprietors at a lower rent than they could do as tenants, whilst the houses are far better cared for than they would be by proprietors who held them merely as investments or mercantile speculations. Even turning to land, take the case of a wealthy merchant who desires to purchase a small residential estate. He could if he chose realize £100,000 without difficulty, and the estate is to cost him only £10,000. But he does not wish to withdraw even £10,000 from a trade which is yielding him 15 per cent., and he borrows it on the land for  $4\frac{1}{2}$  per cent. Is he not more likely in place of less likely to expend money in improvements in consequence of a mortgage which saves him twice the whole rent of the estate? Again, suppose a man in early or middle life and in good health is in the receipt of a large official or professional income, is there any great harm in his anticipating his savings by purchasing an estate, part of the price of which he allows to lie on the land? Such a mortgage would probably be likely to act as an incentive to frugality rather than to extravagance. But these are inconveniences, which I freely admit may be more than counter-balanced by the advantages which Mr. Kinnear abundantly shows would result from putting a stop to the system of "pawning the land." There may be other directions, too, than that of the Land Laws in which the principle on which he founds his proposal might find beneficial application. If it could be realized to the extent of extinguishing the pawnbroker's shop, a still greater benefit would be conferred on the lowest class of all, than that which he anticipates for the general community; and if the system of mercantile credit could be limited to means in place of hopes, the commercial atmosphere would be purified at once. There is no limit, in short, to the advantages which might result from a further application of so sound a principle as that we should "owe no man any thing, but to love one another."

The main obstacle which seems to stand in the way of its adoption, in the form which Mr. Kinnear has suggested, seems, as I have said, to consist in the fact that it takes cognizance of the interests of the borrower only, and ignores those of the lender. If the mortgaging of land is to be forbidden, what is to become of the vast class



of small capitalists who desire to lend on heritable security, and to whom land has no other value than that of permitting them to sleep in peace? What is to become of the Insurance Offices which owe their chief claim to the confidence of the public to their heritable bonds? What, above all, is to become of private trustees, with whom the Courts deal so hardly that it is scarcely safe for them to invest money in any other way? Then, even if we look at the land itself, what will be the effect of cutting it off from the vast stream of capital which is poured into it from these sources, and of which, better or worse, a large portion is no doubt expended in living upon it, if not in cultivating and improving it? If mortgages are to be declared illegal some substitute must be found for them which shall preserve to the large class who never can be cultivators, or even occupiers of the soil, the interest which they at present have in it, and the advantages which they at present derive from it. Now this appears to me to be possible by the adoption of the system of perpetual land-rents, or, in other words, by an extended application of the old system of feuds to agricultural holdings, which I recently advocated in this journal<sup>1</sup> as a remedy for the insecurity which attaches to terminable leases, and the false relations which they create between landlords and tenants. Suppose trustees under a marriage settlement, we shall say, desire to invest £10,000 on heritable security, is there any reason why they should not purchase one of the small estates of which there are already many in the market, and which Mr. Kinnear's proposal would, no doubt, multiply, and let it, at once, to a man who had sufficient means to farm it, but not to purchase it, and who was desirous of being a permanent and unfettered occupier of the soil, on a lease which should endure whilst "grass grew up and water ran down"? There cannot, I think, be the least doubt that the offer of such leases would call a wealthier and more cultivated class of offerers into the field, and give to farming far more of the character of a profession than it at present enjoys. Higher rents would not only be offered but paid for leases which put the tenant in the position of an unlimited, permanent usufructuary, than for an ordinary lease, with its existing restrictions, terminable at the end of nineteen years; and, as eviction would still be possible on the sole condition of non-payment of rent, the security of the land to the purchaser would be the same as to the mortgagee, to the extent at least to which the land retained its value. The interest at present paid for mortgages would be obtained in the shape of rent, the possibility of ultimate loss would be excluded, by the fact that the land could not run away, and the only loss of security to the mortgagee would be the margin of safety, on which prudent agents now insist when effecting mortgages. If the fixed rent became too high there would, no doubt, be a tendency, on the part of the tenant, to allow the farm to fall

<sup>1</sup> "Fixity of Tenure." May 1879.

back into the landlord's hands, or, in other words, to incur what would be equivalent to what we now call the "irritancy of the feu." But the risk of land falling permanently in value is a risk which, hitherto, trustees, even trustees, have been permitted to incur, and there could be no great hardship to pupils or other persons under trust in compelling them to share the general fortunes of the country, as landlords, to a slightly greater extent than they now do as mortgagees. Land would be as safe, at any rate, as the three per cents., and would, in general, yield a larger return. Lastly, as the perpetuity of the lease would take away the *delectus personæ* in the choice of tenants, to which landlords who let on terminable leases naturally attach much importance, there would be no reason why such leases should not be sold, in open market, just as freely as the titles of the owners of the land. There would thus be no impediment to free trade in land, which is, at present, so strenuously, and so justly, contended for. And much of it would probably pass into the possession of insurance offices, banks, and other public companies, who, like the great London Corporations, would be liberal and considerate landlords beyond what private persons as a class can ever be expected to be. There are many other aspects of this proposal which, probably, are not apparent to me, and which, if they were, your limits, and my avocations, would forbid me, for the present, to discuss, but, crude though it be, I have thought that it might possibly not be unimportant to throw it out, as a supplement to a scheme, the general soundness of which I see no reason to question, and "the direct and expected action of which" a more extensive Fife laird than Mr. Kinnear tells me he believes "would be beneficial to the country, though," he cautiously adds, "that it is impossible to say what its indirect and unexpected action might be."

J. LORIMER.

## MUTUAL SETTLEMENTS—THEIR REVOCABILITY.

A MUTUAL settlement is not only a settlement in whole or in part of the means and estate of two persons, it is also a deed in which there are mutual stipulations made and mutual obligations undertaken, to take effect at the death of one or other or both of the parties. It follows that a settlement is not mutual merely because it is the settlement of two persons contained in the same deed—two wills side by side (*Græme*, 7 M. 1062). Nor is it mutual where one of the parties is the true *dominus* of the property settled, the concurrence of the other being only nominal (*Steven*, 11 M. 262). And a settlement may be mutual though it be contained in two or more deeds (*Hogg*, 1 M. 647).

The most important practical question in relation to mutual settlements is the question of revocability or non-revocability. This question depends upon the proper mutuality of the deed.

Proper mutuality in a settlement implies contract, the implied contract being one not to revoke or alter (*Græme, ut supra*) without consent or to the prejudice of the other party, or of the interests stipulated by and obligations undertaken to him.

But most mutual settlements are composite in their nature, pactional *quoad* the granters, testamentary *quoad* the ulterior beneficiaries, embracing what is matter of paction between the parties, though testamentary in the sense of only becoming operative on the death of one or other or both of them—a contract *de futuro* to take effect on the death of the parties (*M'Millan*, 13 D. 187), but embracing also what is purely testamentary as regards each of them respectively. Most mutual settlements may therefore be said to comprise an obligatory or onerous testament by each of the parties as regards the interests stipulated for and the obligations undertaken by and to each other, and a gratuitous testament as regards ulterior interests created by each and either.

Hence it follows that so far as a settlement is properly mutual or pactional and onerous, it is irrevocable on the principle of contract. So far as the settlement is testamentary merely it is revocable, from the ambulatory nature of a testament, by that party whose testament it is.

The main difficulty is to separate and distinguish what is mutual and pactional from what is testamentary merely.

Before considering this point it is convenient to notice the effect of certain clauses which are common in mutual settlements.

First, the clause reserving power to alter, innovate, or revoke. This clause is variously expressed, as, "to each of us during our respective lives" (*Renton*, 3 R. 1142); "to each of us at any time during our lives" (*Reedie*, 12 S. L. R. 625); "to us and each of us and to the longest liver, as we or either of us or the longest liver may see proper" (*Græme, ut supra*); "to us during our joint lives or to the longest liver of us" (*Welsh's Trustees*, 10 M. 16). Or "to us during our lives" (*Craich's Trustees*, 8 M. 898); "to us at any time during our joint lives" (*Traquair*, 11 M. 22; *Mitchell*, 4 R. 800). But in whatever form the clause is expressed, it does not reserve any power which is not impliedly reserved by the general scope of the deed. Whatever its terms, it is not to be interpreted literally, but with reference to the proper mutuality of the deed. If the power to revoke were to be taken as absolute and without qualification, there could be no such mutuality as to exclude revocation (*Græme*, 7 M. 1062); and on the other hand, if there be mutuality, it follows that the power to revoke must be taken with the qualification that it do not prejudice the mutuality. Hence the power to revoke is not to be measured by the terms of the clause reserving it. Notwithstanding that it confers express power upon either or the survivor, the power can only be exercised jointly so far as the settlement is pactional, and therefore mutual, though it may be exercised by either or the survivor so far as it is

testamentary merely *quoad* him (*Welsh's Trustees, ut supra*). And notwithstanding that it is expressly confined to the period of the joint life of the granters, it is only so confined as regards that portion of the settlement which is pactional, and therefore mutual, leaving to either or the survivor full control over it so far as it is testamentary *quoad* him (*Traquair, ut supra*).

Second, the clause specially declaring the deed irrevocable either from the date of execution or from the death of the first deceiver. This clause also is not to be interpreted literally, but with reference to the mutuality of the settlement. If and so far as there is such mutuality as to exclude revocation, the clause is not required. If and so far as there is no such mutuality as to exclude revocation, the clause of non-revocability may be itself revoked (*Mitchell, 4 R. 800*).

Third, the clause dispensing with delivery. *Quoad* the granters, and so far as it is mutual, a mutual settlement is effectual without delivery from the date of execution, and whether it remain in the hands of one or other of them or of their agent. But *quoad* the beneficiaries it remains undelivered during the lives of the granters, or so long as that mutual consent which made, is capable of dissolving the contract (*Hogg, 1 M. 647*); though of course direct delivery to a trustee or agent on behalf of the beneficiaries would render it an *inter vivos* gift, and give them a *jus quæsitum* under it. So far as the deed becomes irrevocable on the death of the first deceiver, it becomes a delivered deed *quoad* the beneficiaries also. But the effect of the delivery or the *jus quæsitum* created depends on the extent of the mutuality. So far as it is gratuitous or testamentary on the part of the survivor it remains still as undelivered, and confers no *jus quæsitum* until the survivor's death (*Fernie, 17 D. 232*). Even its being handed to the trustees appointed by it, and their entering on office and commencing to administer the trust, has been held not such delivery as to bar the survivor revoking where revocation was otherwise competent, and this notwithstanding a clause most anxiously dispensing with delivery (*Mitchell, 4 R. 800*). Nor was the survivor's confirming executrix to the predeceaser under the mutual settlement, and entering into possession of the estate, held to confer a *jus quæsitum* on the ultimate beneficiaries so as to bar revocation, where the survivor took nothing thereby to which she was not otherwise entitled (*Rae, 2 R. 676*).

The result is that these clauses add nothing to the effect of the deed, and do not assist in determining the question of revocability or non-revocability. They merely express, and that not always accurately, what from the scope of the deed is otherwise implied.

To return to the question of separating and distinguishing what is pactional and mutual from what is testamentary merely in mutual settlements:—these deeds may be divided into three classes.

First, where the main object is not the mutual benefit of the

granters themselves personally, but the promotion of a common object. As, for instance, where one brother has already settled his estates by deed of trust directing an entail upon a certain series of heirs, but reserving to himself power of revocation, and another brother agrees to settle a sum of money upon the same series of heirs on condition that the former undertakes not to alter his settlement without the consent and approval of the latter (*Hogg*, 1 M. 647). In this class of mutual settlement the element of contract stands out most clearly. There is the motive or inducing cause, the onerosity or consideration on either side, the contract, and hence the proper mutuality. Each "purchases what is granted by the other by himself making a grant in favour of those in whom they are equally interested" (Lord Curriehill in *Hogg, ut supra*). It follows that the deed being a delivered deed *quoad* the granters from the date of its execution, the survivor cannot alter or revoke after the death of the predeceaser. The predeceaser having paid the price—his grant by his predecease being beyond recall—the survivor cannot withhold the stipulated counterpart. But can such deed be revoked during the joint lives of the granters? On the principle of contract, that mutual consent which made may dissolve the contract, and as the deed though delivered *quoad* the granters is testamentary merely *quoad* the beneficiaries, it may be altered or revoked by mutual consent. Whether it can be revoked by one without the consent of the other, that is to say, whether there is *locus pœnitentiæ* to each during their joint lives, is undecided. Certainly it could not be so without intimation of the altered intention of the one party being timeously made to the other.

Second, where the main object is the benefit of the surviving party to the settlement. Either the property of each is conveyed to the survivor in liferent, with an ulterior destination to the same or different third parties in fee, in which case neither party can revoke the liferent provision in favour of the other, but either, or the survivor, has power at any time to revoke the ulterior destination so far as affecting his or her own property, inasmuch as the ulterior destination is no part of the mutual consideration on which the deed proceeds (*Traquair*, 11 M. 22; *Renton*, 3 R. 1142). Or the property of each is conveyed to the survivor with a substitution in favour of ulterior beneficiaries, in which case the survivor takes the property and may evacuate the substitution (*Davidson*, 8 M. 807; *Winchester*, 1 M. 685), the *spes successionis* of the substitutes not being protected by onerosity (*Lang*, 3 M. 1142). If onerosity is pleadable by the ulterior beneficiary, that is to say, if the beneficiary can establish that the provision in his favour was part of the mutual contract, can in fact identify his interest with that of the predeceasing testator as distinguished from that of the survivor, then the case falls into the third class of mutual settlement. Third, where the main object is not only the benefit of the surviving party to the settlement, but also a benefit stipulated by



each, if predeceaser, for the object of their respective testamentary bounty. In such case the survivor cannot by altering or revoking disappoint the beneficiary in whose favour the predeceaser has stipulated (*Gentles*, 4 S. 749; *Anderson*, 15 S. 435). Such beneficiary acquires *a morte* of the predeceaser (*Nicolson*, M. Ap. v. Legacy, No. 2) a *jus crediti* in the provision in his favour, and to whatever extent the survivor may be entitled to enjoy the joint estate during his life, his estate is debtor at his death in the amount of the provision stipulated by the predeceaser to his donee (*Kerr*, 11 M. 780).

It follows that where the settlement is in the form of a direct fee to the survivor, with an ulterior destination or substitution, it may depend upon which of the parties to the mutual settlement predeceases, whether the settlement falls under the second or the third class, whether there is a mere substitution of or a protected succession to the ulterior beneficiary. If the stipulation in his favour be made by the predeceaser, he has a *jus crediti* against the survivor's estate indefeasible by the survivor. If the ulterior destination was gratuitous on the part of the survivor, and not part of the mutual consideration—if, in short, the interest to maintain the deed is the survivor's and not the predeceaser's—then the survivor may alter the destination or evacuate the substitution. As the gratuitous regulation of the survivor's succession the settlement is so far revocable inherently (*Lang*, 5 M. 789). The question, therefore, must always be, Had the predeceaser the interest to maintain the deed? (*Craich's Trustees*, 8 M. 898.)

A post-nuptial marriage contract is generally in effect a mutual *mortis causa* settlement by the spouses and *vice versa*. In dealing with the revocability of such settlements, therefore, besides the considerations already mentioned, the question of donation *inter virum et uxorem* arises.

As a donation *inter virum et uxorem* is revocable by the surviving spouse after the death and without the consent of the predeceaser, it follows that the ordinary principle of mutuality founded on paction will not necessarily protect such settlements. Farther, the mere contract does not confer a *jus crediti* on children in the same way as an ante-nuptial marriage contract. They are donees for whom either spouse or both may stipulate, but in the question of revocability they are to be regarded merely as third parties—ulterior beneficiaries (Lord Deas in *Kidd*, 2 M. 227).

Hence where donation is pleadable by either spouse *stante matrimonio* or by the survivor, a mutual settlement between spouses is revocable *quoad* the succession of the spouse revoking. The question of donation, and consequently that of revocability, depends not on the fact, but on the extent of the mutuality—on the adequacy of the counterpart provisions and obligations.

At what date then is this adequacy or inadequacy to be ascertained? Is it to be at the date when the settlement is executed, or at the date of the death of the first deceiver of the spouses, or

must you look both at the date of the execution and at the dissolution of the marriage? The importance of the question arises from this, that renunciation of legal rights usually forms a material part of the consideration on the part of one or other of the spouses, whereas their legal rights die with them. In the event of the predecease of that spouse, therefore, if adequacy is to be judged of "as the case turns out" (Lord Gifford in *Mitchell*, 4 R. 800), the consideration given may be valueless. In the latest case on the subject (*Mitchell, ut supra*) the Judges of the Second Division each took a different view on the point, Lord Ormidale holding that the date of the execution of the settlement, Lord Gifford that the date of the dissolution of the marriage, and the Lord Justice-Clerk that both dates were to be looked to. It is thought, however, that their opinions do not really conflict, and that the true rule is to be deduced from that of the Lord Justice-Clerk, by keeping in view the fundamental consideration that a mutual settlement is always a composite deed. The spouses stipulate for mutual benefits, each to him or her self if survivor, and for ulterior benefits to the objects of their respective testamentary bounty. So far as the benefit stipulated for by the spouses, each to him or her self if survivor, are concerned, the date of execution must be looked to. Each has then something possibly to give and something certainly to renounce, and unless the provision by one spouse to the other be grossly unreasonable (*Steven*, 1 Feb. 1809, F.C.; *Fernie*, 17 D. 282), the difference in the value of the mutual considerations will not be enough to infer legal inadequacy (*Hepburn*, 2 Dow, 342). But so far as the ulterior benefits stipulated by each to the objects of their respective testamentary bounty are concerned, then the date of the dissolution of the marriage must be looked to, and the onerosity or adequacy of consideration be determined "as the case turns out." Each spouse has rights in respect of which or the renunciation of which he or she is entitled to bargain on behalf of the persons he or she chooses to favour. But if, as the event shows, the consideration given by the predeceasing and received by the surviving spouse be either entirely valueless or grossly unequal to the benefit stipulated for, the spouse prejudiced is entitled to revoke on the ground of donation (but compare with *Mitchell, ut supra*, *Wood*, 4 Dec. 1823, F.C.).

Whether the spouse revoking on the head of donation is entitled to take benefit under the deed from the succession of the other was a point raised in this case (*Mitchell, ut supra*) but not decided.

Other elements affecting the question of revocability on the ground of donation are, on the one hand, that the wife has contributed by her industry to accumulate the property (*Kerr*, 11 M. 780), and that she makes over any hope of future succession that may open to her (*ibid.*); that the property, though falling under the *jus mariti* of the husband, has come through the wife, and has never been fully appropriated by the husband (*Kidd*, 2 M. 227);

that the husband is under natural obligation to make reasonable provision for his wife (*Kerr, ut supra*; *Gibson's Trustees*, 4 R. 867). On the other hand, that the mutual settlement is an infringement on rights secured by ante-nuptial marriage contract (*Jardine*, 8 S. 937; *Rae*, 2 R. 676).

In conclusion, the effect of revocation by either party to a mutual settlement is confined to his own property or succession. So far as the succession of the other party is concerned, the deed remains the expression of his *ultima voluntas*. So much is this the case that even where a mutual settlement remains unexecuted by one of the intending parties to it, it will be sustained as the testament of the other (*Millar*, 4 R. 87). H. J.

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### NOTES IN THE INNER HOUSE.

THE case of *M'Kenzie v. Blakeny* (2nd Div., Oct. 16, 1879) is of importance to Sheriff-Court practitioners upon the question of expenses. The Court here applied the rule laid down by the Act of Sederunt, 4th Dec. 1878, with regard to the employment of counsel in the Sheriff Court, to the case of a commission granted by the Sheriff to examine witnesses in London. Counsel and agent had both been employed by the successful party at this commission without first obtaining the sanction of the Sheriff, and when the expenses came afterwards to be disposed of in the Court of Session, counsel's fees were disallowed.

The case of *Craigie and Others v. The Commissioners of Supply of Aberdeen* (2nd Div., Oct. 17, 1879) decides a point novel indeed, but about which it is thought there could not be much doubt. The pursuers here maintained that a gentleman qualified to act as a commissioner in respect of his own property, and also as the factor of two other qualified commissioners, was entitled to three votes in the absence of the others, his name in respect of these qualifications having been entered three times in the roll of Commissioners. The Court decided without any difficulty that he was only entitled to one. As Lord Gifford put it, "The simple question is, Whether or not a person is entitled to vote as a Commissioner of Supply? And if this question be answered in the affirmative, it is of no consequence whether his qualification be represented three or four or a hundred times over, he can be placed only once on the roll as a commissioner, and can exercise only one vote;" and Lord Ormidale suggests that "were it otherwise, the same individual might argue and vote in one way or direction for himself, and in another way for the proprietor whose qualifying factory he might happen to hold, and that, too, in questions of a judicial nature."

*Somers v. The School Board of Teviothead* (2nd Div., Oct. 31, 1879) adds another to the already numerous class of cases which have recently been decided relating to schools and schoolmasters.



The pursuer was an "old" schoolmaster in the statutory sense of that adjective, and had contracted with his school board for a fixed salary and a certain proportion of the Government grant. A board subsequently elected resolved to limit this proportion, and the question for judicial determination was, whether it was competent for them to do so. The Court have without any hesitation decided that the board was bound by what their predecessors had done.

In the case of *Edie v. Rigg* (Outer House, Oct. 31) we find an attempt made to suspend a decree on the ground that the successful party's agent held a gratuitous commission as honorary sheriff-clerk in the Court in which it had been pronounced. This attempt was unsuccessful, as it was not alleged that the agent had in this case acted as clerk. But the Lord Ordinary (Rutherford Clark) in giving judgment remarks that he "does not wish it to be understood that he approves of a practising agent holding an appointment as clerk of Court even though his commission contains the qualification above noticed." This was a qualification against the honorary sheriff-clerk acting as such in cases in which he was employed as agent.

The case of *Watt Brothers v. Snead Foyn* (1st Div., Nov. 1) raises rather an important point relating to Sheriff-Court appeals. The 71st section of the Court of Session Act of 1868 provides that where an appellant has not printed the papers ordered or moved in his appeal, the Court may on the motion of the respondent dismiss the appeal and affirm the interlocutor appealed against. By the Act of Sederunt of 10th March 1870 the mere expiry of a certain period of time without action on the part of the appellant has the effect (without any step being taken by the other side) of rendering the judgments of the inferior Court final, and they "shall be treated in all respects as if no appeal had been taken against the same, and the clerk of Court shall forthwith retransmit the process to the clerk of the inferior Court." As explained by Lord Shand, the purpose of the Act of Sederunt "was to save parties the delay which occurred in getting the interlocutor of this Court, and also the expense of unnecessary procedure and the employment of counsel." An appeal was noted from the Sheriff Court of Lanarkshire, and in consequence of a failure on the part of the appellants to comply with the provisions of this Act of Sederunt the case was retransmitted to the Sheriff Court, when the Sheriff decerned against them for expenses, and they were charged upon his decree. They suspended, and the question came to be, whether it was possible by way of suspension to bring back a case to the Supreme Court. The suspenders argued that suspension was competent at common law after advocacy; but the Court held that the effect of the retransmission of the process under the Act of Sederunt was the same as if the case had been heard and disposed of on the merits. The inter-

locutors had become hopelessly final. The Lord President observed, "The Act of Sederunt introduced new regulations and altered those of the statute, but in substituting these new regulations it certainly would be the duty of the Court to provide for all the cases for which the statute had provided doing so, it may be in greater detail; and therefore when we find the words 'judgments shall become final,' we must understand them in no other sense than that the appeal is to be dismissed and the interlocutor affirmed, as provided by the 71st section of the statute." As Lord Shand pointed out, "were it otherwise, a complainer would only have to minute an appeal if he wished to procure delay, and after the benefit of some weeks' delay, obtained at a trifling cost, bring a suspension of the extracted decree."

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## THE REVISION AND REPEALING STATUTE OF 1879.

WE have frequently noticed the work of the Commission on revision of statute law. We have observed how some statutes have by these repealing Acts been set aside by inadvertency, and how in several instances they required to be resuscitated. The Commissioners seem unaware of the radical distinction which exists in the law of Scotland from that of England. From ignorance of this many gross errors have been committed when dealing with the ancient statutes of the northern section of the United Kingdom. Lord Stair has thus very plainly annunciated the distinction: "Our statutes or our Acts of Parliament, which in this are inferior to our ancient law, that they are liable to desuetude. In this we differ from the English, whose statutes of Parliament, of whatsoever antiquity, remain ever in force till they be repealed, which occasions to them many sad debates (public and private) upon old forgotten statutes. But with us the Lords of Session being by their institution authorized with power to make rules and statutes to be observed in the manner and order of proceeding and administration of justice (1537, c. 43; 1540, c. 93), their decisions are final and irrevocable when solemnly done *in fero contradictorio*, and thereby recent custom or practice is established both by their Acts of Sederunt and decisions, which extend not only to the interpretation of Acts of Parliament, but to the derogation thereof." Mr. Erskine to the same effect (B. i. T. i. s. 45) observes: "A posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it; for the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration, and this presumed will of the people operates as strongly as their express declaration."

In these annual revision statutes, Acts from the earliest time of the commonwealth are repealed, although many of them have been expressly repealed by Parliament centuries before. Thus slaying the slain appears a foolish work of supererogation. In the Statute Book for 1879 the Commissioners have directed their attention solely to Ireland. They have produced an Act (42 and 43 Vict. c. 24) under the title "The Statute Law Revision (Ireland) Act, 1879." Their labours commence with the reign of Henry VIII. and end with forty years of the reign of George III. The statutes which have thus fallen under the axe of the Commission fill no fewer than forty-four folio pages of the Statute Book. We cannot vouch as to the moral character of this vast host of murdered statutes, therefore cannot venture to term this exterminating process "the massacre of the innocents." We have been often puzzled with the reservations annexed to the repeal of this annual host of legislative law. In the first place, it is set forth that "the enactments in the schedule annexed to this Act are hereby repealed, subject to the exceptions and qualifications in the schedule mentioned." But this is followed by a saving clause in these ambiguous terms: "Provided that where any enactment not comprised [comprehended?] in the schedule has been repealed, confirmed, revived, or perpetuated by any enactment hereby repealed, such repeal, confirmation, reviver, or perpetuation shall *not* be affected by the repeal in this Act, and the repeal by this Act of *any* enactment shall *not* affect *any* Act in which such enactment has been applied, incorporated, or referred to." Undoubtedly this clause would require a glossary for its solution. We would rejoice to hear a debate on the question how a statute *not* in the schedule of the Acts repealed can possibly be affected by *any* Act repealed. And, still more, especially how the repeal by *this* Act of *any* enactment shall nevertheless affect *any* other Act in which the *repealed* Act has been incorporated. Surely in logic as well as in law the greater comprehends the less. If the principal law has fallen, all subsidiary enactments must suffer the same fate. With these observations we proceed to select some of the Irish statutes which this year have been entombed.

Our Irish friends must hear with no small astonishment that until the year 1879 they were living under such extraordinary laws as the following:—

2 Anne, c. 15, "To prohibit Butchers from being Graziers."

2 Geo. I. c. 10, "To restrain Papists from being High or Petty Constables."

15 Geo. II. c. 4, "For allowing farther time to Persons in Offices or Employments to qualify themselves, pursuant to an Act entitled '*An Act to prevent the farther growth of Papacy.*'"

*Note.*—This indulgence is oft repeated by Acts, but now repealed by the Act 1879.

1 Geo. III. c. 13, "For quieting the Possessions of Protestants deriving under Converts from the Popish Religion."

17 and 18 Geo. III. c. 24, "To prevent the Mischiefs that arise from driving Cattle within the City of Dublin and Liberties thereof."

23 and 24 Geo. III. c. 21, "An Act for licensing Hawkers and Pedlars, and for the encouragement of *English Protestant Schools*."

*Note.*—It is remarkable that in many subsequent statutes the licensing of hawkers and pedlars is coupled with English Protestant schools.

23 and 24 Geo. III. c. 35, "To prevent the Pernicious Practice of erecting Glass Houses within the City of Dublin or a certain distance thereof."

23 and 24 Geo. III. c. 56, "For the more effectual Discovery and Prosecution of Offenders called Houghers, and for the Support and Maintenance of Soldiers or others houghed, maimed, and disabled by such Offenders."

31 Geo. III. c. 43, "To prohibit Horse Races in the neighbourhood of the City of Dublin."

These are a mere sample of Acts of Parliament which, certainly long unknown to the Irish, they appear to have been living under until the year 1879, from which, by the charitable interference of the Revision Commission, they have at length been liberated.

H. B.

## CITY BANK APPEALS.

### NO. IV.

THE case of *Ker* (Fyfe's trustee), decided in the House of Lords May 20, 1879, and reported in 16 Scot. Law Rep. 507, was, to use the words of one of the noble Judges, a peculiarly hard one. The circumstances of the case showed pretty clearly that Ker, though he tried to make out that he was not so, had truly been a trustee at the outset by acceptance of the trust, and by various actings, such notably as signing dividend warrants for other stocks, and even for the stock of the City of Glasgow Bank held by the trust. It also, however, appeared that he had wished to resign, and upon a letter in which he suggested such a step some argument was maintained; but their Lordships held that whatever the wish or intention, that wish was not carried into effect; indeed, even had it been so, they pointed out that *qua* this stock, and its attendant liabilities, any resignation of trust must have been inoperative, because not duly communicated to the Bank. It requires a formal act to get on to the register as a trustee, so equally we see there must be compliance with like formalities where the name is to be removed. A hint was thrown out by the Lord Chancellor, that

there might be other ways in which trustees might be protected from the risks of improper dealing with the trust funds by beneficiaries or others without a transfer involving such serious responsibilities. His Lordship is reported to have said, "It is to be observed that the Bank stock having been included in the marriage-settlement it would become the duty of the trustees, and of their legal agent, to provide in some way for the perfecting of the title by the trustees to the stock, and for preventing any improper dealing with it by the original owner. Whether a transfer of the stock into the names of the trustees was the only way in which this could be done it is unnecessary to consider. It clearly was one of the ways; and the action of Mr. M'Clure in obtaining a transfer of the stock, if it was not sanctioned beforehand by the appellant, might naturally be approved by him after he knew it." One can readily see that by the employment of arrestments in certain ways this end might be perhaps attained without any transfer where there were living beneficiaries and true owners, or where the truster had died leaving the stock to his trustees (the most usual case probably) by transfer to the true beneficiaries with the use of similar precautions, or perhaps of security found by the true possessor. What Mr. Ker, however, unfortunately for himself, did, was first of all to go on to the register of shareholders as a trustee, and then, even if he did resign, to make no use of his resignation as he should have done. The consequence was, of course, that the Courts of law in every stage of the case brought up against him the fatal observation that he had never taken such action as to warn the creditors of the Bank and the other shareholders that he had ceased to hold the stock. Whatever the value of his name as a partner in the security held out by it to the shareholders, and in the credit afforded by it, whereby people were induced to lend or advance money upon the faith of it—whatever, we say, the value, however great or however small, the loss of that value must be made known to the public, and it was not so made known.

Another mode of attack was adopted in the case of *Tennent*, decided on the same day as that of *Ker*. Mr. Tennent, who was a large shareholder, and had held his stock for five or six years, turned round upon the Bank with an allegation of fraud. There was no trust interposed in this case between the beneficiary and the Bank. The name stood simply on the register with that of the other copartners. It is impossible not to feel the force of the observations made in the House of Lords in this case. In the Court of Session the Lord President had laid down three legal propositions applicable to and determining the question, and to the principles contained in these propositions the Court of last resort added the force of their approbation. These propositions were as follows: "In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded. Secondly, this does not mean that the contract is void till ratified,

but it means that the contract is valid till rescinded; and thirdly, the option to void the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission." English authority was quoted to show that where a winding up had begun there was no room for the rescission of any contract on the ground of fraud. Here truly the winding up had begun, because the directors had taken a step no doubt suspending the immediate action of any creditor, but a step only pointing to a voluntary in lieu of a compulsory winding up. If two men enter into a trading partnership, the law would not permit one of them at any moment to retire and thus escape liability for the debts of the firm, nor could a partner in a joint-stock company act otherwise in this respect than a simple trading partner.

It may happen, and in practice it frequently does happen, that a partner in a firm, for instance, grants either by himself or by his firm bills, and while they are still current, and while also the firm is still strong and flourishing, he leaves it. But after a time the firm fails, the bills have not been, it is found, retired, and he is called upon by the creditors to pay though he is quite out of the concern. The reason is that it is a trading concern, and the loss, wherever it falls, may not fall on innocent third parties; and we must notice that this Bank was a trading concern also, and that these questions of liability all were raised and decided upon that footing. Yet, taking our illustration a step further, we may suppose a fraud by one of the partners in granting these bills. Will that relieve the retired partner who was a member of the firm when they were granted? Surely not. His only remedy is against his late partner, not against the creditor who was defrauded. But it may be said retirement from an ordinary partnership is one thing, and transfer of your shares in a joint-stock company is another, because in the latter case you are at once rid of your liability, or at worst the period during which you continue liable is limited by statute. Your transfer is effected irrespective of creditors, and if you have fraudulently been induced to take shares, you may throw them back upon the company which defrauded you, while it is still a going concern. The Lord Chancellor in a few sentences met any such argument: "The company is a going concern, is assumed to be solvent and able to meet its engagements, and to have a surplus; and, the company being solvent, its duty to pay the repudiating shareholder what is due to him, and to take the shares off his hands, is an affair of the company and not of its creditors. But if the company has become insolvent, and has stopped payment, then, even irrespective of winding up, a wholly different state of things appears to arise. The assumption of new liabilities under such circumstances is an affair not of the company but of its creditors."

Now Mr. Tennent had taken no steps till the Bank had closed its



doors, had called in accountants to examine its affairs, and in fact had ceased to be "a going concern." That being so, the House decided that the directors could not alter the status of the shareholders by allowing repudiation any more than they could do so by registering transfers. We have ventured to make these few observations on *Tennent's* case, as being suggested in the opinion of the Lord Chancellor, because they seem more and more to emphasize the view taken by the Courts of law in these joint-stock bankruptcies, if we may call them so, that when really the difficulties come and the business is brought to a standstill, every one who is a shareholder comes to be precisely in the position of an ordinary bankrupt trader.

In the case of *Nelson-Mitchell* a sale of stock took place on 'Change a few days before the Bank stopped, but of course the Bank, who were themselves the purchasers, declined to implement the bargain by executing a transfer, and their refusal was held to be justifiable in accordance with the decisions we have already considered. There was, however, a point raised, but not decided, in the House of Lords (though the Court of Session gave it in favour of the liquidators), in relation to the fact that the brokers' contract did not, as required by 30 Vict. c. 29, sec. 1, set forth the person or persons in whose name or names as registered proprietor or proprietors the stock stood when the sale took place.

The case of *Buchan* (16 Scot. Law Rep. 512) raised several important questions, somewhat, however, incidentally, for upon the facts that were elicited at the proof which was led the question of liability truly was held to be governed by the decision given in *Muir's* case. In the first place, we may observe that an attempted resignation by Mr. Buchan of his office of trustee and executor of Mr. Gibson after the bank had stopped (which, moreover, was never intimated to the Bank) failed, just as in previous cases similar attempts had failed; secondly, the actings of the appellant were held clearly to have established his position as a shareholder *qua* trustee, he having by them authorized the placing his name on the register, and continued upon that for more than twenty years. Again, in the same way the point made upon Mr. Buchan's being "executor," and not "trustee" simply, also failed. The argument as to this, however, led to important observations by the learned Peers upon the 38th clause of the deed of copartnery of the Bank. That clause provides "that every assignment of shares in security or *mortis causa*, and confirmations thereof by right of succession, shall, after being completed, be recorded in a book to be kept for that purpose, and such deeds, transfers, assignments, and confirmations shall be delivered or returned to those in right of the same after having marked therein a certificate of the registration thereof, and that the production of such writings to the manager or ordinary directors for the purpose of registration shall *ipso facto* infer the acceptance



of the capital stock therein specified and the liabilities of the parties having right to the same as partners of the company." The Lord Chancellor and Lord Selborne, both of them, made comments upon the unusual and peculiar form of this clause, appearing as it does to imply that by production of his confirmation to the Bank there was on the part of the executor an authorization to the Bank officials to transfer the shares to his name. The clause, Lord Selborne said, mixed up the case of confirmation to the testamentary disposition of a deceased shareholder with that of any ordinary transfer as if there were no difference between them. Every document produced under it is equally to be returned having a certificate of registration marked on it. It was pointed out that authority could be given indicating the proper steps to be taken by an executor when he did not wish to incur any responsibility in holding shares belonging to the deceased, but merely to complete his title so as to transfer them to some third party. "He may," said the Lord Chancellor, "have the shares transferred into his own name, and become to all intents and purposes a partner in the company. He may, on the other hand, not wish to have the shares transferred into his name, and he ought to have a reasonable time allowed him to sell the shares and to produce a purchaser who will take a transfer of them." Now what Mr. Buchan was held to have done was equivalent to the first of these alternatives, and consequently his case fell under that of *Muir*. He held them without demur for twenty-four years, so the question of reasonable opportunity did not, could not, arise. Referring elsewhere to the case of *Hoare* (2 Johnson and Hemming, 229), it was pointed out by several of the learned Lords that the main difference between an executor and a trustee, had it fairly arisen, must lie in the representative character of the former. He is merely, as it were, the *alter ego* of the deceased, whereas the trustee stands in his own shoes; he is a partner in his own person, whatever he may be bound to do as regards the dividends. The receipt of these *by an executor*, even for many years, would not, according to one opinion expressed, make any difference, or render him in any way personally liable, where there had merely been a production of the confirmation so that it might be recorded, and where a certificate had been given "in terms which might have reference to his character of executor." The mere form of the entry in the Bank books or in the stock certificates would not, it appears, have by any means inferred personal liability, unless there was something beyond to *transfer* the shares to the person in question. Lord Selborne put his views upon this point as follows:—

"Trustees have not, in any proper sense of the word, a representative character, but executors have; and when both the liability and the interest of the testator is transmitted to them by virtue of their testator's contract, contained in such a deed as this, it must

retain its original character until there is a forfeiture or a transfer which ought not to be presumed from any equivocal acts. Having representative rights, it is impossible that they should not be entitled to produce the legal evidence of them to the company, for the purpose of having their title in some way recorded and recognised, without making themselves personally liable. This would be a necessary preliminary, even to the exercise (since 1862) of the statutory right of transfer."

We have dwelt more upon this distinction than may appear necessary, considering the circumstances of the particular case; but there can be no doubt that if executors could, as such, hold for long periods stock of banks in this way, very material changes might be introduced into questions of liability, for the banks themselves might come to be of opinion that the security of the executry estate was in itself sufficient to warrant their permitting persons to hold their stock merely as representing an estate and not one or more individuals.

(*To be continued.*)

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## Correspondence.

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### LAW AND LEGISLATION OF THE PAST YEAR.

(*To the Editor of the Journal of Jurisprudence.*)

SHERIFF COURT-HOUSE, GEO. IV. BRIDGE,  
EDINBURGH, 5th December 1879.

SIR,—I am more than surprised at your reply to my letter. You say that the profession will be glad to learn that, *so far at least as intention went*, there was, on my part, no "philippic" against any Judge.

You have displaced the issue between us. The question is not what I intended to do, but what I did.

Of the term "philippic" the meaning is not ambiguous. You call it a classical phrase, and so it is. But it has a place in our modern vocabulary as well. It means personal invective.

Now any man who publicly uses personal invective against a Judge for anything said or done in fulfilment of judicial functions commits an offence which the law will punish. The offence is aggravated by every circumstance, such as education and intelligence, implying that he should have known better. For an official in my position to deliver in public a personal invective against a Judge, no terms of blame could be too strong. Mere censure would probably be deemed inadequate. The charge, if true, is disgraceful to me. To whom, let me ask, is it disgraceful if it be not true?

I have asked you to prove it. You endeavour to do so by publishing, for the first time, three passages of my address. These I take in their order.

Let me complete your first quotation by a sentence which immediately precedes it, and which you omit. It is not irrelevant to the matter in hand, and runs thus (after quoting the direction to the jury): "But may I, with all due humility and respect, observe that the intent in this direction mentioned, by no means comes up to the intent charged in the indictment?" Then follows the passage you have given.

And what does that passage come to? A contrast between popular language and legal language, one of the most common and most absolutely impersonal topics which can be handled by lawyers. It is nothing less than amazing that this should, by any ordinary intellect, have been mistaken for personal invective.

But your next quotation is more amazing still. Here it is. "We must know, we are presumed to know, the law we break; we do not know, we cannot be presumed to know, a law which no human authority, legislative or judicial, has hitherto declared." This a philippic against a Judge or against any human being whatever! By the same process of unreason a libel might be discovered in a theorem of Euclid.

Your last citation in support of your indictment runs thus: "Those who take their impressions from unthinking public opinion will read certain passages of that important and now historical document" (the Judge's charge) "with some surprise." One of us evidently does not know the meaning of words. Here as elsewhere I strongly declare my preference of the Judge's opinion over unthinking public opinion, and you make that an offence against the Judge! This is absolute bewilderment.

You speak of my "somewhat flippant" allusion to Bill Sykes. Why "flippant"? I take a known type of the criminal classes; I make him write on his prison wall a known popular distich illustrating, as I think, an axiom of criminal jurisprudence. Is this an offence against any one? As we do not seem to be agreed on the meaning of the word "philippic," it is possible we may not be at one as to the sting of the word "flippant."

But let there be no mistake as to the import of my plea of Not Guilty to the grave—the disgraceful—charge you have made against me on materials in your own hands. It is not a question of intention but of fact. My plea is not a disclaimer but a denial. You are now good enough to suggest that I didn't mean it. My reply is that I never did it.

In conclusion, I have the honour to submit to you this dilemma: Either you don't know the meaning of the words you use, or you have made a charge against me which may be expressed by one of the shortest words in the English language. You may choose your horn.—I am, sir, your obedient servant, **FREDERICK HALLARD.**

[We regret extremely that anything that has appeared in these pages should have had the effect of making Mr. Hallard forget that

courtesy and amiability which are usually so characteristic of him. We have neither space nor inclination to enter into controversy with him, and our words of explanation must be few and final. The article which Mr. Hallard complains of was written by one of our most regular and valued contributors, who used his discretion in choosing the phraseology he employed, a discretion which we have no cause to impugn. As for "a disgraceful charge" being made in the article in question, we can only say that we cannot see that any was made, and certainly none was meant. We are not in the habit of allowing "disgraceful charges" to appear in these pages, least of all against persons in the position of our correspondent. Before lecturing us on our knowledge of the English language Mr. Hallard would do well to consult a dictionary; if he had done so we do not think he would have found the word "philippic" described anywhere as "personal invective," and no one, we are sure, ever thought from our article that he had animadverted on the learned Judge in a personal manner. We cannot, however, enter into any further argument on the matter, as the space at our disposal is too limited to be spent on mere personal squabbling. We overlook all the hard words which the Sheriff has hurled at our devoted head in his letter, and would with all due deference suggest that he would better consult his own dignity if, when next he happens to be adversely criticised, he would refrain from writing argumentative and petulant letters on the subject.—ED. *J. of J.*]

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#### ACCURACY ABOUT ADJUDICATIONS.

SIR,—Your readers who have followed this correspondence can decide whether or not I misunderstood Mr. Dove Wilson's original statement, that "all adjudications in use were at one time competent in the Sheriff Court." I merely add on this question that the true account of the older law appears to me to be not as Mr. Wilson now proposes to correct his original statement, "All adjudications in use *prior to 1672* were at one time competent in the Sheriff Court," but "the action of adjudication was at no time competent in the Sheriff Court, with the possible exception of the case of adjudication *contra hereditatem jacentem*." The further examination I have given the subject has satisfied me that it is going too far to say that even adjudication *contra hereditatem jacentem* was certainly competent in that Court upon the authority of *Ker v. Primrose* (M. 46), contrary to the view of Stair (iii. 2. 45), the implied doubt of Mr. Bell as to the soundness of that decision, and the course followed in the case of *M'Lachlan v. Bennet* (4 Shaw, 717), referred to in my last letter, where the advisers of a party who

had led such an adjudication in a Sheriff Court thought it necessary to lead a new adjudication in the Court of Session.<sup>1</sup>

The view of Stair and Bell to which I refer is briefly this, that all adjudications other than the statutory adjudication under the Act of 1672 were equitable remedies introduced by the Court of Session for cases to which the diligence of apprising was held inapplicable.

Mr. Wilson has discussed in his second letter a new point at considerable length, whether adjudication in security, which he admits was never competent in the Sheriff Court, was in use prior to 1672.

On this point he impugns not any statement in the Court of Session Practice, but the clearly expressed opinion of Mr. Bell (M'Laren's edition, i. p. 752), who, although he was a writer in the Court of Session, will be acknowledged by all Scottish lawyers to be an authority of the first rank. He also impugns the opinions of the Judges in the case of *Queensberry's Executors v. Tait* (11th July 1817, F. C.), who, according to the Faculty Collection, are reported to have observed, "Long before the Act 1672 adjudications of various kinds had been introduced by the Court from necessity, *e.g.* adjudications in implement, adjudications in security," etc. The reporter of that case was Mr. Tait, unless I am mistaken, the same gentleman whose MS. on Court of Session Practice is well known, and amongst the Judges in the Division which decided it were Lords Glenlee, Meadowbank, Robertson (the first), Craigie, and Pitmilley. I do not think an observation of such Judges is disposed of by the remark, "If any of the Judges really made the statement, the authority on which it was made has not been preserved." I am rather inclined to believe that the history of the law of adjudications was more familiar to the eminent lawyers of that generation than it is to practitioners, or even to Judges of the present day, and when I find their opinion coincides with that of Mr. Bell, I should be disposed to say, so far as authority can settle such a point, this is not a case of mere repetition of the same statement, but strong confirmation of its accuracy.

Mr. Wilson is ingenious in his argument against these authorities, and the cases he quotes are, it seems to me, sufficient to show that after 1672, and until the decision of *Blair's* case in 1711, it was a doubtful point whether where a debt was due *in diem* adjudication in security was valid. But if he had not abandoned the guidance of Mr. Bell he would have learned that adjudication for a debt not yet due (*in diem*) was only one application of adjudication in security. To prove that this particular application of the diligence

<sup>1</sup> I admit, however, that in two other cases, *Marshall's Creditors v. Hamilton*, 1709, M. 47, and *Drummond v. Jackson*, 1731, M. 49, the competency of such adjudication in the Sheriff Court was sustained, and in a third, *Graham's Creditors v. Hyslop*, 1753, M. 49, where it was doubted and no decision on this point pronounced. Kames gives his own opinion in favour of the competency. This, therefore, is a question still fairly open to argument.

was not established until after 1672 is no proof that it had not been used in earlier times in other cases. Steuart's Answer to Dirleton's Doubt, part of which Mr. Wilson quotes quite properly as evidence of the later introduction of adjudication in security for a debt *in diem*, is in fact proof that about its application in other cases no such doubt had existed. "I should think," Steuart says, "that this creditor *in diem* might be allowed to adjudge for security in the terms of his debt, even as a creditor for relief or warrandice is allowed to adjudge in security before distress."

I still think, therefore, that the following account of the law as given by Bell is strictly accurate: "As a prætorian remedy in equity, adjudication in security may accordingly be applied for where the debt is not yet due; or where it is contingent, or where the creditor has it not in his power to establish the amount of it, or perhaps also where the creditor has no proof of the debt instantaneously to produce. Before adjudications were substituted for apprizings, adjudications in security had been adopted by the Court of Session as an equitable remedy where apprizings were not competent."

Mr. Wilson asks for authorities, by which I understand him to mean decisions to show that adjudication in security was in use prior to 1672.

I am not aware of any reported decisions on the point either way, but the absence of decisions in this early period of our law is an unsafe criterion in matters of practice. In Dallas's "System of Styles," however, according to the quaint inscription of its author, "Begun in the year 1666, and had its period *anno* 1688," but which undoubtedly is an authoritative record of still earlier practice, there will be found (p. 226) a "summonds of adjudication on extream diligence in matters not liquid, but consisting in deeds prestable, whereof there be various kinds, but this may serve for all *mutatis mutandis*."

On the new point discussed by Mr. Wilson, whether adjudication in security was in use prior to 1672, I submit the safe conclusion to be, that while it is certain that it was used in 1684, *Bruce v. Hepburn* (2nd Jan. 1684, M. 57), there is no sufficient reason to doubt that according to the opinion of Mr. Bell, and the Judges in *Queensberry's Executors v. Tait*, it had been introduced prior to 1672, although it was not till after that date that the competency of its application to a debt of which the term had not arrived was settled by decision.

To most of your readers I am afraid this antiquarian controversy can have small interest, but you will pardon a legal writer when challenged to vindicate not merely his own accuracy, but that also of one of the masters of the law. Æ. J. G. MACKAY.

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## SUGGESTED IMPROVEMENTS ON THE NATURE AND FORM OF THE PROCESS OF INFESTMENT.

SIR,—There is still room for simplifying the forms of infestment, as well as for substantially improving that process, so as to make it more extensively effective of its purpose. The particulars of every transmission of a heritable right, publication of which is the invariable purpose of infestment, whatever its form, are—(1) the party publicly divested; (2) the party publicly vested; (3) the heritable right transmitted; and (4) the title by which the transmission is effected. In certain forms of notarial instrument there are various other statutory requirements, all evidently intended to make the description by the notary of the right transmitted as far as possible a mere narration of the active words of the title conferring the right, with as little abstract description as possible, so as to lessen the risk of misconstruction or misrepresentation of the nature of that right. In this respect the Legislature have overshot their mark; for such rules can only be useful to the notary and those for whom he acts, as no other person can ever rely on the notary's statement apart from the title; and those requirements have necessitated such eccentric variations in the forms of notarial instruments as increase the difficulty of the notary's duties more than they simplify them in other respects. All real requirements might be attained by enacting that the particulars before mentioned—being those substantially useful to the public, and invariably used—should in all cases be articulately set forth; the heritable right being described in any terms which would be sufficient in a registrable conveyance by the party last infest, leaving it to the discretion of the notary to decide in each case whether abstract description, or description by narration of the active words of the titles conferring the right, is most suitable, but requiring all such narration to be confined within the precincts of the descriptive clause, so as not to complicate forms as at present. All such notarial instruments would then be uniform, capable of easy adaptation to all cases, and in ordinary cases very simple and intelligible.

Of more importance, however, than any change in the mere forms of infestment is the substantial improvement of the process, so that it may effect its purpose in those cases in which it at present fails to do so. That purpose is to publish transmissions of heritable rights, so as to keep the public secure from frauds or mistakes. This publication is at present conditional on the making of an extremely dilatory and expensive search of the property record; and this condition fails in a very large number of cases. Parties very often refuse to incur the necessary expense, and in many districts searches are very rarely made, the boasted advantages of the public records being there mere myths, and parties and agents incurring much undue anxiety and responsibility.



Negotiating such transactions, which are the rule in country districts, is one of the most unsatisfactory duties of an agent. The great desideratum is a simple, prompt, and inexpensive mode of search, which will extend to all kinds and grades of transactions the advantages presently enjoyed in sales of large estates. One way of effecting this would be to have every writ, recorded or to be recorded, designated by a number in the record, and to require that every writ presented for registration in future specify the number of the prior infeftment, or each prior infeftment, to be exhausted, wholly or partly, by the operation of the new infeftment, and to require the keeper of the record to mark the number of the new infeftment on the margin of the record of each such prior infeftment, and to copy, in his certificate of registration on the new infeftment, all such markings previously made on the margin of the record of such prior infeftment. The titles would then comprise a perfect search of the property record from the commencement of the new system, available in all transactions without delay or expense, and more reliable than any present mode of search. There seem no serious difficulties in the way of such a change. Some alterations, of a beneficial kind, would require to be made on the law of accretion, which could not continue to operate *ipso facto*, nor retrospectively. The ascertainment of the last infeftment would present no difficulty, as it must always be known to the conveyancer, and this has for a considerable time been required, without much reason, but with no serious inconvenience in practice, in infefting general disponees and heirs. Such a scheme might involve reasonable compensation to searchers, but this would for a time come of itself in the increased number of searches which would be made for the period previous to the proposed change, so as once for all to make the title of each property or other right perfect *per se*. SIMPLEX.

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### Review.

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*The Institutes of English Law.* By DAVID NASMITH, LL.B., of the Middle Temple, Barrister-at-Law. 4 volumes. 1873-1879. (Butterworths.)

THOSE laborious and methodical men, the German professors, expect of the young jurist who comes under their ken that he shall begin his professional studies with a course of what they, with an assumption of omniscience, are bold enough to term Encyclopædie. In other words, they with much justice regard it as only fair that the budding advocate, judge, or legislator should know in outline what sort of a country he is about to explore, how it is divided, not only from other realms, but internally within its own borders; how the country came to have the features it possesses at

the present, and what are and have been the most authoritative guide-books at various periods of its history. That part of this survey which is concerned with the boundaries that surround and the subordinate march lines that cross the legal realm, they dub Methodology. The plan thus followed in the German universities has the merit of logicality, a merit which is simply decisive in these exalted regions. But it labours under one or two serious defects, which detract from its usefulness when actually put into practice. It presupposes a bowing acquaintance at least with a great deal of which the tyro is *ex hypothesi* completely ignorant, and with which he only becomes conversant after his course of study has been wellnigh completed. And it seeks to attract the student by pitchforking him neck and crop into the midst of the very hardest, driest, and most repulsive part of the ordinary business-man's training—that which relates to the pure theory, the dry bones of his professional culture. Take the department of Methodology as an example of what meets him at the very outset. He cannot help seeing that the progress of method in jurisprudence is like the progress of what is usually called the science of metaphysics—the progress of a millwheel or of a log at seesaw. The method of Gaius among the classical jurists determined the method of Justinian as set forth in the Institutes, and satisfied the unscientific experts of the civil law for precisely one thousand years. The craving for method did not again make itself known till 1272 (at which date Durant or Durandus is believed to have published his “*Speculum Juris*”), but seems to have arisen none too early, as before the end of the seventeenth century no fewer than thirty-nine editions of this ponderous tome are said to have been issued. In the sixteenth century Cujace, and in the seventeenth Pufendorf, Leibnitz, Carpsov, and Thomasius took the hint thus broadly offered, and published elementary handbooks, chiefly or mainly concerned with method, which are now, we fear, scarcely known to a busy world even by name; while the two last centuries have produced, on the continent of Europe alone, similar works which would occupy many pages of a publisher's catalogue. And yet, it must be confessed, with very little result. The questions how nearly “sib” jurisprudence may be to ethics, and whether in the ascendent and descendent line or collaterally; what is meant by or embraced in the law of persons and the law of things; where obligations and actions ought to come in; what shall be regarded as matter of substantive law or merely matter of procedure, are only a few of the nuts which it has been found possible and plausible to crack by an infinite number of fissures, all of them displaying a suspiciously ragged edge. And so, we suppose, it will continue to the end of time.

After what has just been said, it might be sufficient to remark that the four neat little volumes now under review are an application of the rules of method to the noble but haphazardly constructed

fabric of English law by an expert methodologist. Mr. Nasmith has shown an instinct for tabulation which suggests that the line of beauty must consist for him in that which springs from John Styles or Ego or Propositus (according to the taste of the genealogist), and shoots out umbrageously all around the honoured name, bearing all manner of fruits, circular, square, and diamond-shaped. He has published a chronometrical chart of English history which has found favour with many eminent men of different nations, including two Lord Chancellors and a Prime Minister of Great Britain. And in these volumes are contained tabular analyses of their subject-matter, than which nothing can be more useful to the student of law. It may be said with some confidence that these tables, and the text to which they are affixed, contain the first detailed and systematic attempt on this side of the Channel to give a concise view of jurisprudence as at present understood and practised, with special reference to the proper distribution and division (*Gliederung*) of the subject—in short, to method. In making the attempt the author shows much dexterity, and makes it clear, moreover, that he has a mind of his own, and is not to be led against his judgment of what is right by any authority, however august. In the division he has adopted he differs from Gaius, from the French and Prussian codes, from Blackstone, from Austin, and from our own institutional writers. It only remains to notice how he has set about solving the problem which has puzzled so many men during the last sixteen hundred years.

The first book treats of general jurisprudence and public law. The former term includes the origin of law, or the philosophy of social and political union, and a treatment of the principles common to all legal systems. Public law, properly so called, begins with a useful sketch of the development of the British Constitution, goes on to public international law, and concludes with English public municipal law, including crimes, the Church, education, and martial law. The other books are occupied with private law, divided into substantive and adjective. Substantive private law is divided into the law of persons and the law of things. The former includes status, duties, and torts, certain relations existing either by nature, by force of law or by contract, and obligations. The latter includes *dominium*, the various estates of English law, interests in personality, alienation by contract and in trust, and succession. Adjective private law embraces two matters—what we know as evidence, here termed procedure; and the measure of damages.

It would be easy to cavil at this division, to point out where things cognate are kept apart and things diverse are brought together; to show where important omissions have been made by the author, and obvious slips allowed to pass by the printer. For instance, it might be shown, we think, that much is included under adjective law which has no right to be there, and much omitted which is only to be found in books on practice. It is not to be

expected that the experienced practitioner will seek this book as a sufficient guide in any department of practice, though one of its special merits lies in its being an excellent guide, by reference, to more diffuse treatises. But as an introduction to the study of English law, as a guide to the student amid the mazes of an overgrown system, and as an indication of the relation which subsists between different parts of that system, we can recommend it as the only work of the sort in the English language, and as a carefully prepared exposition of the leading rules of the English jurisprudence of the past as well as of the present time.

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### The Month.

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*Education Acts, 1872, 1878: Can Children be dismissed from School when their Fees are not paid?*

A CASE occurred recently in the west of Scotland where a parent was unable from poverty to pay school fees for his child. He applied to the parochial board for assistance to pay the fees, but his application was refused.

The school board thereupon dismissed the child from school, and prosecuted the parent in the Sheriff Court for having grossly and without reasonable excuse failed to discharge the duty of providing elementary education for his child. The prosecution failed, the Sheriff-Substitute holding that the parent had sufficiently discharged the duty laid upon him by section 69 of the Act of 1872, by sending his child to school, and by making application to the parochial board for assistance to pay the fees which he alleged he was unable to pay, and that it was the duty of the school board to have applied to the Sheriff, under section 22 of the Act of 1878, who would have made inquiry into the circumstances of the parent, and, if necessary, have ordered the parochial board to pay the fees. The school board then wrote for advice to the Secretary of the Scotch Education Department, London. The question and answer are taken from a local paper as follows:—

#### *Question.*

“Recently the School Board of —— raised a little the school fees in some of the lower branches of education. At present trade here is very much depressed; a number of parents decline to apply to the parochial board, and the children are dismissed from the school. I am vexed for the poor children, and I will feel greatly obliged if you will favour me with your opinion—May a child in a public and State-aided school be dismissed when the parent states that he is unable to pay the fees required?”

*Answer.*

“SCOTCH EDUCATION DEPARTMENT,  
WHITEHALL, LONDON, S.W., 25th Oct. 1879.

“REV. SIR,—I have the honour to acknowledge the receipt of your letter of the 21st instant. The 53rd section of the Education (Scotland) Act of 1872 gives the Department no power to interfere with the discretion of school boards in fixing the amount of school fees to be paid in public schools. Section 69 of the same Act points out the course to be pursued in case of inability to pay school fees. See also section 22 of the Act of 1878. My Lords would suggest that if any large number of children are excluded from the public schools of your burgh by the unwillingness of the parents to apply to the parochial board for assistance, the parents should memorialize the school board on the subject. In fixing the rate of fees in their schools, a board will naturally be guided by the knowledge of the ability of their constituents to pay these fees.—I have the honour to be, rev. sir, your obedient servant,  
“J. R. SANDFORD.”

The school board in question, after duly considering this reply (which does not throw much light on the point), agreed to intimate to the teachers that, as the fees were payable in advance, they would be held responsible for the fees of all children whom they admitted.

Section 69 of the Act of 1872 imposes upon every parent the duty of providing elementary education for his children between the ages of five and thirteen years, and in the event of his being unable from poverty to pay therefor, it is his duty to apply to the parochial board for assistance. Prior to the Act of 1878 the decision of the parochial board was final as to the ability or inability of the parent to pay, but that Act makes it incumbent on the school board, in the event of the parochial board refusing, to apply to the Sheriff, who after inquiry may, if he shall think fit, grant an order on the parochial board to pay the fees.

The question arises, In the event of the Sheriff holding that the parent is able to pay, or in the event of a parent who is well able to pay refusing to do so, what is the proper course for the school board to pursue? It appears to the writer that section 70 of the Act of 1872 cannot be used as a means of enforcing payment of school fees, that an action in the Small Debt Court is the proper mode of recovering school fees due, and that in no case can a school board be justified in dismissing any child from school on the ground of non-payment of fees.

*The “Trial Scene” in the “Merchant of Venice.”*—A correspondent writes as follows to the *Law Times*: “A criticism on the play now being acted at the Lyceum may seem out of place in your columns, but I hope a suggestion of an alteration in the way in which the business of the trial scene is conducted will not be considered

inappropriate. My suggestion is that Portia should be raised to the Bench, and I think that if this were done it would assist Mr. Irving in the two objects for which he so faithfully and earnestly strives, viz. a correct interpretation and a lifelike representation of Shakespeare. I assume that all your readers have read the scene, and for the benefit of those who have not seen it acted I will describe the way in which it is now rendered. The Duke sits in the middle of the bench with four magnificoes on each side of him. Portia, preceded by her clerk, enters, kisses the Duke's hand, and retires to a table placed in front of the bench, where she sits down in company with the clerk of the Court, a position corresponding to a seat in the solicitors' 'well.' Her seat is close to the Jew, and when the latter is ordered to stand forth that she may see him, she has only to turn round to find herself face to face with him. Every action of Portia seems to show that she is an advocate and not a judge; and I suspect that Miss Terry has studied the behaviour of some young practitioner, for, after taking her place, she half rose, and, having made an uncertain kind of bow, as if she wished to be deferential, but was not sure about the proper moment for bowing to the Court, sat down again. Now, what is the part assigned to Portia by Shakespeare? Why, precisely that of the recorder or a puisne judge sitting at the Old Bailey with the Lord Mayor and aldermen. The Lord Mayor sits in the middle, with aldermen on each side, and the judge, recorder, or 'learned doctor,' sits at one end. The Duke says that he will dismiss the Court unless Bellario, whom he has sent for to 'determine' the case, comes. Portia, disguised as Balthazar, comes instead of Bellario, and the Duke says, 'Take your place.' Portia then interrogates both parties, construes the bond, makes an appeal to Shylock not to insist on specific performance, gives sentence in the name of the Court and stays execution, unless Shylock will consent to an impossible condition. Shylock and Gratiano repeatedly call her judge, and the former styles her a pillar of the law. As if to make her *rôle* of judge complete she makes a poor joke, which is apparently (but the audience know she has her private reasons) in very bad taste, and is obsequiously imitated by her clerk. The case in hand being settled she arraigns Shylock on a criminal charge, and pronounces sentence against him, the Duke having only the prerogative of pardon. The fact that Portia is offered a large reward just after the trial does not count one way or the other. It has no bearing upon the fortunes of Shylock or Antonio, and is obviously introduced for furthering the little lark with her husband, which Portia has got up on her own account. Shakespeare's intention appears so clear that Portia probably takes up her position with a view to stage effect. But how much this effect would be enhanced if she took her place on the bench. Imagine the flutter and rearrangement of the seats of the magnificoes or big-whigs! How natural then that she should ask to



have the parties pointed out, and that the bond should be handed to her. Her clerk would sit just beneath her and might make her remarks—standing up and half turning round—as *amica curiæ*, and a consultation between Portia and the other judges would afford an opportunity for the speeches of Antonio, Gratiano, and Bassanio. The ‘sensation in Court’ which follows the remarks of Portia would be more justifiable if she were the judge, and the beautiful lines beginning, ‘The quality of mercy,’ which are now addressed by Portia to Shylock in an argumentative way, and, as if she were trying to make a difficult point clear to him, would come appropriately, and have a more telling effect from the bench.

“POETS’ CORNER.”

*Balaam’s adviser speaks.*—The following amusing correspondence appears in our contemporary, the *Albany Law Journal*:—

“‘*To the Editor of the Albany Law Journal*:

“‘That quotation, “Sufficient unto the day,” etc., is not from the Bible at all. It is from “Imitation of Christ,” by Thomas à Kempis. Get it, read it, and profit by it. I refer to foot of first column, page 400, *Law Journal*, November 15, 1879. Law writers should be exact in their quotations.—Yours truly, BLACKSTONE CHITTY.’

“We seldom,” says the editor of the *Albany Law Journal*, “pay any attention to anonymous communications, but the writer of the above seems in such manifest spiritual danger from ignorance of the Bible that we make an exception in his favour. If Mr. B. Chitty had resorted to his quotation dictionary he might have saved himself the mortification of this exposure. Let him borrow a Bible, and consult Matthew vi. 34. And let him read the next communication below, go west, and avail himself of the facilities therein set forth.

“‘*To the Editor of the Albany Law Journal*:

““*Lawyer’s Bible Class.*—Meetings for the study of the Bible by lawyers will be held this week on Tuesday, Thursday, and Saturday, from 12.30 p.m. till 1 p.m. The first meeting will be held in Justice Peck’s office, No. 222 Superior Street, and will be led by J. E. Ingersoll, Esq. The Thursday’s meeting, the place of holding which will be announced hereafter, will be led by Henry C. White, Esq. Lawyers are requested to bring their Bibles.”

“‘Knowing that your interest in the legal profession is not confined to its mere material prosperity, nor yet to the intellectual status of its members, I enclose the above excerpt from the *Cleveland Leader* of the 18th inst., which is, I think, the first record of an attempt to evangelize the bar, as distinguished from others “of the baser sort.”—Yours truly,

A NEW YORK LAWYER.

“‘CLEVELAND, O., November 18, 1879.’”



## MY WIDOW.

BY AN INVOLUNTARY CONTRIBUTOR TO WHAT HE THINKS THE MOST INIQUITOUS  
INSTITUTION OF THE NINETEENTH CENTURY—THE ADVOCATES' WIDOWS'  
FUND.

A BACHELOR born (a common fate),  
And doomed to die a celibate,  
Still I must pay thine annual rate,  
My widow!

I'm trapped! A wife you may divorce,  
Get rid of her by fraud or force;  
With thee there's no such blest resource,  
My widow!

No wife in this drear world have I;  
And in the other, when I die,  
Thy sweet face will not greet my eye,  
My widow!

Mateless in both worlds thus I am;  
Yet I *must* pay. O shameful sham!  
No wonder that I often damn  
My widow!

Doubly bereft, 'tis I should be  
Put on the Fund; and yet on thee  
Devolves the snug annuity,  
My widow!

Full many a maid have I embraced;  
But never did I clasp thy waist,  
Nor nectar of thy lips did taste,  
My widow!

What art thou like? Art dark or fair?  
With carroty or raven hair?  
Of common or *distingué* air?  
My widow!

"With meek and unaffected grace,"  
Dost thou put on a pious face?  
Dost *girn*, or giggle, or grimace?  
My widow!

"You pay your money, take your choice,"  
In all things else; but I've no voice  
In that which does thy heart rejoice,  
My widow!

Ah! never shall I call thee wife;  
 Ne'er see thy lineaments in life;  
 Never enjoy connubial strife,  
                     My widow!

From Death's dim realm a ghostly hand  
 I'll stretch to thee and all the band  
 Of shadowy babes that round thee stand,  
                     My widow!

We ne'er shall see (at which I'm grieved)  
 Our family, all unachieved;  
 Conceivable, but unconceived,  
                     My widow!

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## The Scottish Law Magazine and Sheriff Court Reporter.

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### SMALL DEBT COURT OF LANARKSHIRE—GLASGOW.

Sheriff LEES.

HUTTON v. COCHRANE AND CO.

*Master and Servant—Bad material—Imperfect work.*—This action was brought as a test case that it might be settled judicially whether potters are entitled to claim payment for plates containing hair-cracks in the circumstances detailed in the following judgment:—

“The sum at stake in this case is only 17s. 10d., but the real object of the parties is to obtain a decision on certain principles in regard to which they disagree. The pursuer is a potter, and his duty is after having put the clay on the moulds to place them in the stove that they may be dried. When they are dried he takes them out of the stove, and raising each plate off the mould he examines it to see if there are any cracks or defects in it. If he sees any his duty is to break up the plate. Plates which are passed are gathered into batches of twelve or eighteen and put into an oven or kiln to be fired for somewhere about forty-eight hours. At the end of this time they are taken out and examined by girls under the supervision of the warehouseman, and if on inspection any defective plates are discovered, these are laid aside and rejected as being not ‘good out of oven,’ or ‘good off kiln,’ as it is variously expressed. The practice is that the potter is only paid for the work which is good off kiln or good out of oven; and in this way he receives no remuneration for the dishes which prove bad either from the clay being bad or the mould being bad, or which receive injury in ordinary course in the kiln. This, I say, is the practice, and the pursuer has not been paid for such dishes, and does not claim to be paid for them if through any of these causes they are injured and rejected. Now this being the practice, it is a legitimate inference that the wages paid by the employer to the workman are calculated on this basis. On the one hand, the workman loses the value of the work he has expended in making the plates; on the other, the employer generally loses the material, the cost of firing, the wages of the kilnman who fires the plates in the kiln, and all other the like expenses. There is thus a loss on both sides, and as regards the mutual rights of the parties, thus far both sides are at one.

But they have brought this case to have it judicially ascertained what are their rights in regard to points which I shall presently mention. The pursuer has adduced a number of his fellow-workmen. But his chief witness and his best witness is the man Campbell, a most intelligent and straightforward witness. Now the position that Campbell takes is that though the workman should not be paid for plates which have been injured in any of the three ways I have mentioned, yet that if he is in a position to show that his plates have been injured through the fault or carelessness of the kilnman, the loss should fall on the latter and not on him. In the second place, he contends that if the work proves defective through the fault of the moulds, a workman has a legitimate right to receive payment for defects which are not due to his fault. But he goes on, with much moderation, to state that a workman, if he knows what he is doing, can very quickly ascertain if the moulds are defective, and that his duty is, as soon as he ascertains this, to give notice to the employer. The potter, he admits, has no practicable claim to be paid for work which proves defective through this fault of the moulds till he has informed the employer, and only if the employer thereafter compels him to work with moulds which cannot turn out good work. As regards this contention I understand the defenders to maintain now (even if they at any time took another view) that it is fair and well founded, and that a workman ought not to be refused remuneration for work which is defective through what is practically the master's fault. The parties being at one on this point, I am relieved from offering any detailed opinion as to it, and I shall only say that I agree with the view that they both take. But in the third place it is urged for the pursuer that the plates in question should not have been rejected as bad. It is said that this plea is well founded because the moulds were bad, and because in any event the cracks are very slight. The three points which thus remain to be disposed of raise questions which must be dealt with—the first, as matter of general principle; and the second and third, as matters of fact having to do only with the dishes in question.

“Now on the general principle as to whether a potter should or should not be paid for work which he has done, but which the kilnman has spoiled, my opinion is on the whole with the pursuer. It is urged for the defenders that the practice of the trade has always been that a potter has no valid claim to be paid for plates which the kilnman has spoiled, but that the master, if he thinks fit, pays the potter for the work on the injured dishes, and of course deducts it from the kilnman's pay. It is not quite clear that the practice on this point has been uniform and undisputed. It would rather appear that it has sometimes been made matter of question which was left unsettled, and that on other occasions the point has been disposed of by the master paying the potter where there was clear and serious fault on the part of the kilnman. It is obvious that in either event the master is likely to suffer a certain amount of loss. If he deducts the cost of workmanship on the broken dishes from the potter's wages, the loss of the employer is the cost of the material and all the other matters I have already mentioned. On the other hand, if a dish be injured through the fault of the kilnman, it is plain that the amount the master has to pay the potter for wasted work is a justifiable deduction from the kilnman's pay. There may, of course, be plates which through nothing that can directly be called fault get injured in the kiln. As regards these the potters are willing to bear the loss. But I confess I see no just answer to their plea, that where they can *prove* that the loss has been caused by the *fault* of a fellow-workman, they should not suffer in such a case. It must be noticed that they accept the burden of proving this, and it certainly commends itself to every principle of fairness that where there is a loss the loss should fall on the workman who is to blame, and not on the workman against whom no fault can be alleged. An attempt was made to show on behalf of the defenders that there is a contract express or implied that the loss shall fall on the potter. There is certainly no proof of any such contract having been expressly made, and I cannot say I am satisfied that there is sufficient proof of an implied

contract to this effect. The doctrine indeed is very analogous to the somewhat fictitious principle set up by Courts of law in regard to cases where a workman has been injured in his person by the fault of his fellow-workman. It has there been repeatedly decided by the Courts of highest authority that a workman is to be held as in some way or other having accepted (so far as the master is concerned) the risk that he may be injured by the fault of his fellow-workman, and that his wages are calculated on this footing. That, it has been said, must as matter of necessity be held to have been within the contemplation of parties. But in the matter in dispute between the parties to the present case I cannot say I see any reason for saying that the potters necessarily undertook that they would bear not only the loss due to bad material and bad moulds supplied by the master, and to injury in ordinary course in kiln, but also the loss caused by the fault of a fellow-workman. And therefore I am, after mature consideration, of opinion that on this important question of principle the pursuer is in the right.

"The next matter that I have to dispose of is whether the moulds supplied by the defenders were bad, and whether the pursuer informed them of this, and was compelled thereafter to work with the bad moulds. Now the evidence in the first branch is very conflicting. The witnesses for the pursuer attribute any defects in the work to various causes. Some say it is the fault of the material, others the fault of the moulds ; while some of the witnesses for the defenders allege that the defect was the fault of the workman in the manner in which he put on the clay or pressed it home. Now it is for the pursuer to prove that the moulds are bad, and he has adduced one witness who tried them and says they were, and several other witnesses who from inspection of the moulds say they are not good. On the other hand, the defenders' foreman and several of their workmen swear positively that the shapes from which the moulds are made are those that have been in use in the work for many years, and that they have turned out work which is quite satisfactory. And as regards the moulds in question the witness Talbot swears to having made many dozen perfect plates with them since this action was raised. There is also evidence before the Court that the chances of the plates being injured through clinging to the moulds are much greater when the moulds are perfectly new, and that with every time they are used their glazing or hardness, which causes this risk, disappears. This may to some extent account for the discrepancy in the testimony of the witnesses. But the result to which I come is that I am unable to say the pursuer has discharged himself of the onus of proving that the moulds in question are bad. Even if he had established this, I cannot say that there is any adequate proof that any part of the work for payment of which he asks was done by him after complaint to his employers that the moulds were bad. This suffices for the disposal of his case so far as it is based on the plea that the moulds are bad. But in the last place, he urges that the cracks would have disappeared in the glazing of the plates, and in any event were so very slight that the plates ought not to have been rejected. In support of this plea he proves that other plates of the defenders which they had in stock, as well as plates which they have supplied to the trade, have cracks as bad or nearly as bad. Now, as regards this, I think that for the practical management of affairs much must be left to the discretion of the master or his representatives. He has little interest to reject plates unless the cracks or defects are so serious that the work could not be sold, or could be sold only as second-rate work. His interest is rather if anything to pass as many plates as possible. And whether this be his interest or not, I think that in this matter, as in some other branches of law and in questions of privilege, it must be *assumed* that the master or his representatives are acting fairly and to the best of their judgment in deciding what work can be allowed to pass and what cannot. But the power of the Courts of the country to decide whether his decision has been well or ill founded cannot be excluded. A workman, if dissatisfied with the decision, must have the right of every citizen of this country to claim the decision of a court of law. And

therefore I think the pursuer is justified in asking me to settle to the best of my judgment whether or not the plates in question were rightly or wrongly rejected by the warehouseman. But, on the grounds I have stated above, I think the onus must be laid on him of satisfying me that the warehouseman acted wrongly in rejecting them. A considerable number of plates were brought down and exhibited before me. I approach the decision of the question with this great disadvantage (but a disadvantage under which a judge must often labour), that my knowledge of the point is derived solely from the information put before me by the witnesses examined. Now the witnesses in this case differ very considerably in their opinions as to the materiality of the defects in the plates. But I am bound to say that as regards one or two of the plates which several, if not all, of the pursuer's witnesses characterized as good, I am unhesitatingly of opinion that from whatever cause the defect arises, it manifestly is so great that the defenders were fully justified in refusing to pass these plates. Five witnesses for the pursuer divided amongst them the labour of examining the plates, and therefore each speaks only to the one-fifth which passed under his own eye. But there are several witnesses for the defenders who speak to having examined all the plates, and naturally therefore a greater weight must, *ceteris paribus*, be attached to the numerical superiority in the evidence for the defenders. But further than that I must to a certain extent be guided by the opinion I have formed of certain of the plates which the pursuer's witnesses have stated are in their opinion good, and which, as I have said, are in my opinion plainly bad. I arrive at this conclusion in regard to the 110 dozen plates in dispute with little satisfaction; for if I could examine the whole of the plates, I think it is likely I should pass a good many of them. But deciding it as I now do, I must pass all or reject all, and the latter appears to me on the evidence the correct decision. But I desire to say that, in my opinion, the expedient course was for parties to consent to my remitting to a neutral party to examine them all and report. The result therefore to which I come is, to hold that the pursuer has not succeeded in satisfying me that the plates were wrongly rejected by the defenders. The effect of this is that he must lose the claim he makes for the 17s. 10d. But I am well aware that *that* probably is a trifling matter compared with the questions of principle which he has raised, and on which success has been, to a material extent, with him. Bearing this in mind, and that the case was brought, not as a case for 17s. 10d., but as a test case, I think a fair adjudication of expenses is to give them to neither party."

Act.—Lindsay.—Alt.—Baird.

## SHERIFF SMALL DEBT COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

COLLIE v. MAIR AND SMITH.—16th December 1879.

*Vituous intromitter.*—In this case the Sheriff-Substitute pronounced the following judgment: "This complaint sets forth that the defenders, who are the widow and stepson of the deceased James Mair 'Duncan,' are, as vituous intromitters with the estate of the deceased, liable to the pursuer in the amount of a certain account. It is perhaps irrelevant to consider whether or not the deceased alone incurred this account, as it is only in the character of vituous intromitters that the defenders are sued. It may, however, be observed that the account stands in the pursuer's books in the name of 'Mair' Duncan, and that he seems to have been concerned in the order of all the items which it contains, although several of them were articles intended for the use of the defender Smith, his stepson, a minor, then residing in family with him. But the real question must be whether or not the defenders can be considered vituous intromitters. Now, in support of his contention the pursuer relies upon the fact that in the house inhabited by the defenders there are articles of furniture which belonged to the deceased, and which are made use of by

them. I have no hesitation in saying that this fact is not sufficient to render them liable as vitious intromitters. It is not alleged that they have sold any of this furniture; they have merely continued in possession of it. Nor have they concealed it from the creditors; on the contrary, they express their willingness to give it up. In the case of *Thomson v. Jones* (Dec. 9, 1834, 13 Shaw, 143) a widow continued without legal title in possession of certain furniture and machinery in the house at the time of her husband's death. The Court were unanimous in holding that she had not incurred liability as a vitious intromitter. Lord Balgray remarked: 'If this were to infer vitious intromission and universal liability, I conceive it would produce the most injurious consequences to that great portion of the population of this country, which consists of the smaller tenantry, or minor manufacturers and shopkeepers. It is not to be expected that amongst them, the moment that the breath is out of a husband's body, the widow is to cede possession, or make up a legal title.'"

*Act.*—Gordon.—*Alt.*—Colville.

## Notes of English, American, and Colonial Cases.

SHIP AND SHIPPING.—*Marine insurance—Charter-party "to be cancelled" in event of war—Restraint of princes—Closing of port of export.*—Plaintiffs having chartered a ship to one C., to proceed to Galatz, after completing intermediate employment, and to load a cargo of grain from there or certain other Eastern ports, effected an insurance with the defendants by a time policy on loss of freight for a whole year, the perils insured against being amongst others "restraint and detainment of princes." By a memorandum on the charter-party it was agreed: "In the event of war, blockade, or prohibition of export preventing loading, this charter-party to be cancelled." At the time of the ship's arrival at Genoa, in completion of the intermediate voyage, war having been declared by Russia against Turkey, the plaintiffs learned that the ports specified in the charter-party were closed. C. declined, upon plaintiffs' request, to cancel the charter-party, and they accordingly sent the ship in ballast to Constantinople; but the ports still being closed, and there being no prospect of their being opened, the ship did not proceed further eastward, but obtained a cargo from Constantinople to England at a freight less than the chartered freight, and the plaintiff brought this action on the policy for the difference:—*Held*, by Cockburn, L.C.J., and Manisty, J. (Lush, J., dissenting), that the plaintiffs were not entitled to recover, on the ground that by virtue of the memorandum the charter-party became void on the closing of the ports, that being a prohibition of export preventing loading; and that the charter-party having been thus rescinded before the ship sailed from Genoa, the chartered voyage, the subject of the policy, had never begun. *Held* by Lush, J., dissenting, that on the true construction of the memorandum the charter remained in force until one of the parties elected to avoid it, which he would have the option of doing within a reasonable time after the happening of any of the specified events; that here it continued in force until the loading became impracticable, namely, when the ship was at Constantinople, and that the plaintiffs had, therefore, an interest in the chartered freight, which they lost by the restraint of princes, and were entitled to recover from defendants.—*Adamson v. The Newcastle Steamship Freight Insurance Association*, 48 L. J. Rep. Q.B. 670.



# THE JOURNAL OF JURISPRUDENCE.

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## A NEW FORM OF ISSUE—UNDUE INFLUENCE.

IN his "Contrat de Vente" (sec. 233) Pothier lays it down that justice and equity require that contracting parties should be in a position of equality, and that everything which tends to injure that position is contrary to equity. The character of a "perfect law of liberty," equality, and order is indeed unattainable by any system of positive law, and to the end of time there will always be grievous violations of the "perfect law," of which the forum of conscience alone can take cognizance; but it should be the constant endeavour of Courts of justice and the Legislature alike to keep this lofty ideal in view, and every step by which positive law approaches more nearly to it is a benefit to the community and will be hailed with satisfaction both by the practical and the scientific lawyer. Such advances are daily taking place under the fostering care of our supreme Courts, and the great fabric of positive law is steadily undergoing development; but its progress is necessarily slow and almost imperceptible, and it therefore rarely happens that any important change or improvement is made by any one decision. Such a change, however, appears to have been effected by a very noteworthy recent case, that of *Gray v. Binny*, in which the First Division, on 5th December 1879, adhered to an able judgment by Lord Young. The doctrine there made the ground of decision, particularly by Lord Shand, has been settled law in England for upwards of half-a-century, and had been foreshadowed by previous decisions in Scotland; but in this case it has been clearly and unequivocally enunciated for the first time in this country, and the decision may therefore justly be regarded as inaugurating a new era in an important branch of the law of Scotland. The pursuer in that case had been induced by his mother and her law-agent to part, in her favour, with his expectancy of succeeding to an entailed estate for a sum of about £6270, while the actual value of his interest amounted to £41,000; but the pursuer could not plead incapacity, or facility on his part coupled with circumvention by his mother; and still less was there ground for accusing her of direct personal fraud. Had the case, therefore, been tried by jury,

it would have been difficult or impossible to adjust an issue in harmony with those time-honoured forms from which little deviation has hitherto been permitted, and which we shall now notice briefly before proceeding to examine the bearings of the case itself.

The primary object of our inquiry is to ascertain the grounds on which, apart from essential error or intimidation, one-sided or unconscionable bargains may be set aside; but our remarks will to some extent also embrace cases where no inadequacy of consideration is alleged. It has long been settled law in Scotland that a party seeking to reduce a deed must, in order to obtain an issue, allege, either (1) total incapacity on the part of the granter, or (2) impaired capacity of the grantee coupled with fraud or circumvention on the part of the grantee or some one acting on his behalf, or (3) direct fraud, "*causam dans*;" or he may aver that the granter was labouring under essential error, or that violence or intimidation was used by the grantee. To these different grounds of reduction belong corresponding forms of issue, all of which partake more or less of a *stricti juris* character, being distinctly separated from each other, and therefore ill adapted to meet the exigencies of the not unfrequent cases which lie on one of the border-lines between them. The great importance of the decision we are about to notice consists in the fact that it "mitigates and corrects" the strictness of these forms by providing a remedy for cases to which they do not apply, and practically introduces a new and most useful and flexible form of issue. The issue may not necessarily, or even ordinarily, be tried by jury, but it will still be the issue on which the decision of many cases will depend.

The principal decisions which have paved the way for the introduction of this new issue have almost all been pronounced since the middle of the present century. The first important case of the series is that of *Railton v. Matthews & Leonard* (14th June 1844, 3 B. Ap. 56), in which Lord Justice-Clerk Hope directed the jury that "undue concealment," in order to form a ground of reduction, must be wilful and intentional; but that direction was held erroneous by the House of Lords, who laid it down that concealment of facts material to the contract, which a party is legally bound to disclose, but which he ignorantly or innocently withholds, forms a good ground of reduction. This is probably the first Scottish case in which it was held that the party to a contract who fails to disclose material facts may be entirely innocent of moral fraud, though convicted of what has sometimes been termed legal or constructive fraud. The epithet, however, is objectionable, as it may in many cases affix an unmerited stigma to an unintentional offence; a more appropriate term would generally be merely failure or misapprehension of duty. The next case of the series is that of *Marianski v. Cairns* (19th July 1850, 12 D. 1286), where it was held that "weak and facile and easily imposed on" were flexible terms, applicable to the condition of a person not necessarily weak in intellect, but who, from helplessness

or old age, might be incapable of resisting violence or intimidation. It was considered a sufficient ground of reduction that the granter should be weak and facile *quoad* the person under whose influence the deed was granted. While, therefore, direct fraud on the one part, or palpable facility on the other, had hitherto been the only recognised grounds of reduction in cases of this class, it is practically settled by these two cases that they may sometimes be construed so as almost to mean perfect innocence and full mental vigour respectively. The case of *Clunie v. Stirling* (14th November 1854, 17 D. 15), as pointed out by Lord Shand in the case of *Gray*, clearly illustrates the objection to confining issues to fraud, or facility and circumvention, when the party aggrieved is obviously entitled to a remedy on equitable grounds involving no such serious charges. In that case the law-agent of one of the parties to a contract induced the other party, whose state of health precluded him from fully understanding the nature of the transaction, to enter into a bargain highly disadvantageous to him; but of its disadvantageous character the agent did not seem fully aware, and neither fraud nor circumvention could fairly be imputed to him. The pursuer, however, obtained a verdict on the issue of facility and circumvention, and also on that of fraud; but the latter issue, as a ground of the verdict, was very properly afterwards abandoned by the defender. The Court granted a rule to show why the verdict should not be set aside as contrary to evidence; but the rule was discharged on the grounds stated in the opinion of Lord Justice-Clerk Hope. The chief ground of judgment was, that as "the issue of facility and circumvention has a very wide and flexible meaning," the facility of the granter and the lesion he had sustained were so great as to raise the inference that he had been circumvented. At the same time it was expressly said that this constructive circumvention did not attach any moral stigma to the party by whom it was practised. This case therefore shows that "circumvention" may, on equitable grounds, be held consistent with perfect guilelessness, or, it may be, ignorance or stupidity; and it illustrates the awkwardness and absurdity of adhering to a *stricti juris* form of issue containing objectionable and injurious epithets which equity declares to mean nothing, or at least to mean something totally different from their popular acceptation. The issue really, though not nominally, tried in this case was—"whether the granter was facile, and the deed disadvantageous to him; and whether the grantee's agent, through whose influence it was obtained, was ignorant of the one-sided nature of the transaction," or at most "whether the agent had failed to make due inquiry as to the fairness of the transaction before inducing the granter to enter into it." The truth is that facility may approach so closely to absolute incapacity that the element of circumvention is almost reducible to zero, while the amount of the damage sustained may often afford a measure or test of the greatness of the facility. The case of *Clunie* thus fell nearly on the border-line between the first two of the

above-mentioned forms of issue, and it was only by an equitable distortion or a deletion of the word "circumvention" that the second form was held applicable to it. To meet the requirements of such a case, and to prevent the recurrence of such abuse of language, a new and useful form of issue might easily be devised. It is, at least, certain that the stereotyped forms of issue now in use are often inappropriate. Of facility deepening into imbecility, and of circumvention blackening into direct and conscious fraud, it may be equally well said, in the words of Lord Cockburn, that they "pass into each other by such shadowy gradations that they are often difficult to be distinguished." There is thus no limit to the number of cases which may occur with different shades of these elements, and it is obvious that three sharply defined forms of issue cannot adequately meet the requirements of every possible case.

In most of the remaining Scottish cases now to be noticed the chief ground of reduction relied on was the exercise of undue influence on the part of the grantee or his agent towards a granter standing on a confidential footing with the grantee, and entitled to rely on him for assistance and advice. In these cases, as in those above noted, it will be observed how shadowy are the gradations from absolute to partial incapacity and perfect capacity, from direct fraud to constructive circumvention and complete innocence, or at least ignorance, and from essential error to some slight and incidental misapprehension. In *Anstruther v. Wilkie* (31st Jan. 1856, 18 D. 405) Lord Wood and Lord Cowan went so far as to hold that a gift by a client to his law-agent during the subsistence of the agency was absolutely null, but Lord Justice-Clerk Hope based his judgment on the sounder ground that the transaction in that case fell to be set aside on account of its extortionate character, the agent having made an improper use of his influence over his client. The pursuer in that case sought to reduce the transaction on the ground that it was a *pactum illicitum*, but the judgment of the Court proceeded on the somewhat unsatisfactory and unscientific ground that it was reducible "in the circumstances." Had the case been tried by jury the pursuer would perhaps have been required to allege fraud on the part of the agent, and to take an issue in the third of the forms above mentioned; and his case would not improbably have broken down. The true issue was, and had the case been tried by jury should have been, "whether the granter, being unduly or improperly influenced by his law-agent, executed a deed greatly to his disadvantage." In *Harris v. Robertson* (16th February 1864, 2 Macph. 664), where a client had, to his lesion and without independent advice, disposed property to his law-agent, the issue allowed was in the appropriate form—"whether the defender wrongfully, and in violation of his duty as agent, induced the pursuer to enter into the agreement to his lesion;" but the Lord Ordinary (Kinloch), in reporting the case to the Inner House, observed that it "touched on very delicate ground," and that there was "little applicable

authority to be found in our own law-books." This decision fairly recognises the necessity of a form of issue occupying an intermediate position between the second form ("facility and circumvention") and the third form ("fraud"). The true grounds of reduction in such a case appear to be that the granter is to be deemed facile as in a question with the grantee when acting under his influence, and that the grantee has, it may be ignorantly or innocently, failed to discharge the duty he owes to the granter. In *Grieve v. Cunningham* (17th December 1869, 8 Macph. 317) the correct rule was laid down by Lord Barcaple, and affirmed by the First Division, that a deed by a client in favour of his law-agent is not null, but that the strong presumption of its having been obtained by undue influence must be rebutted by the agent. Again in the case of *Tennent v. Tennent* (14th March 1870, 8 Macph. H. L. 10), where a son alleged that he had granted a deed to his disadvantage under the undue influence of his father, it was held that he had failed to prove his case, and that mere inadequacy of consideration did not form a sufficient ground of reduction. But it was observed by Lord Westbury that the slightest speck of imposition, misrepresentation, or undue concealment on the part of the father, or the fact that the son had acted under the guidance of his father's agent, would afford the necessary supplementary ground of reduction. A somewhat similar case is that of *Cunninghame v. Anstruther* (9th August 1872, 10 Macph. H. L. 39), where Lord Chancellor Hatherley expresses a strong opinion that a daughter in minority accepting in her marriage-contract provisions from her parents in full of all she could claim from them, is entitled to look to her father for protection; and, accordingly, if she has been induced by him, without the fullest knowledge of the circumstances and independent advice, to grant a disadvantageous discharge, she will afterwards be entitled to set aside the transaction. In the case of *Munro v. Strain* (14th February 1874, 1 R. 522), where a clergyman had made misrepresentations to a dying man, and thereby induced him to alter his will, Lord Ormidale disapproved of an issue of undue influence, on the ground that the clergyman did not use it in his own favour; but there seems hardly sufficient reason for making the distinction indicated by his Lordship. A clergyman may in such circumstances be conscientiously actuated by good motives, and may think himself justified in using what appears to him a *dolus bonus* with a view to accomplish his purpose; but whether his motive be good or bad, and whether his influence has been used reprehensibly or mistakenly, the wrong thereby done to the sufferer is equally great, and equity requires that a deed obtained under such "undue influence" should be reduced. Lord Justice-Clerk Moncreiff in that case indicates an opinion that the averments might have been so framed as to warrant an issue of "undue influence," and observes that "clergymen, medical men, and lawyers are of necessity in a position to acquire great influence over their clients, patients, or parishioners,"



and if they use it to overcome the will of persons in these relations to them "for purposes of their own, such acts will be viewed with great jealousy." At a subsequent stage of the same case (18th June 1874, 1 R. 1039) it was held that the challenger of a deed need not establish general facility on the part of the granter, but that it sufficed for him to prove such facility as might cause him to succumb to the circumvention used. (See *Marianski's* case, quoted above.) We are thus gradually introduced to that class of cases in which a person of perfectly sound capacity must be deemed "facile," or imperfectly capable, or unduly fettered, when he acts under the influence of a person confidentially related to him. Lastly, reference may be made to the case of *Cleland v. Morrison* (9th November 1878, 6 R. 156), where, in conformity with the decisions just cited, it was held that an agent cannot make use of his fiduciary character to acquire for himself the subject of the trust, unless with the full knowledge and consent of his client acting under independent advice; and it was farther held that adequacy of consideration affords no defence.

It may now be pointed out that this interesting branch of law has been fully developed in England for upwards of half-a-century, owing to the greater frequency with which cases falling under it have occurred in that country. The most important decisions will be found in 1 White and Tudor's L. C., pp. 183 *et seq.*, and in 2 Tudor's L. C., pp. 547 *et seq.*, where the English doctrines are fully and lucidly explained; but in their main features they may be summed up here in a few sentences. The doctrine laid down by Lord Eldon in *Montesquieu v. Sandys* is the same as that of Lord President Inglis in the subsequent Scottish case of *Grieve*, already noted. In the important English case of *Huguenin v. Basely* a settlement by a widow in favour of a clergyman, who acted as her adviser and agent, was set aside on the ground of undue influence and abuse of confidence. "This," says Mr. Tudor, "is a leading case on the very salutary jurisdiction of equity, to set aside, upon the principle of general public policy, voluntary donations obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him." Or, in the words of Sir Samuel Romilly, "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another." Mr. Tudor then proceeds to cite a number of cases in which the undue influence was exercised by a parent towards his child, by a guardian towards his ward, by a trustee towards the beneficiary, by a physician to his patient, and in other analogous circumstances, and his list will probably be farther extended in future. In such cases a gratuitous or disadvantageous deed granted by the person subject to the influence in question is presumed to have been procured by an undue exercise of that influence, and the *onus* lies on the donee to prove that the transaction was fair, and that the donor was fully informed and



advised regarding the whole circumstances. On the other hand, if the grantee of a donation or a deed disadvantageous to the granter stand in no fiduciary or confidential relation to the granter, the Court will not set aside the deed, however improvident, the parties being at arm's length, and being presumed to act with their eyes open, unless the deed be tainted with imposition of some kind, in which case the *onus* of proving the deceit rests on the granter. The soundness of these well-settled rules is beyond all question, but it seems hardly accurate to speak of them as grounded on "principles of general public policy." This vague and unscientific expression points to the existence of some supposed general principle of "policy" or expediency, in contradistinction to law and equity; but it need hardly be said that there is no good ground for such a distinction, and that it is truly on the plain and ordinary principles of justice, as evolved by circumstances, that all these decisions truly rest.

An endeavour having thus been made to trace the recent history of the law applicable to the reduction of deeds on the ground of imperfect capacity on the part of the granter, coupled with varying degrees of deceit, or with actual or constructive breach of duty, on the part of the grantee, the importance of the recent case of *Gray* will now be more apparent. The opinions of the judges in that case are well worthy of careful perusal. It is not enough, said Lord President Inglis, that the pursuer has been "stripped of his inheritance for a grossly inadequate consideration," and "that he has been betrayed into the transaction by his own ignorance," but he must prove "deceit or unfair dealing on the part of those who take benefit by his loss." (It may, however, be remarked incidentally that the remedy of reduction would doubtless have been equally competent had the deceit been practised by one who took no benefit from the transaction, but was actuated by some other motive, or, as the Lord Justice-Clerk expressed it in the case of *Munro v. Strain*, had "some purpose of his own" in view.) If the parties to a contract "are strangers to each other, and dealing at arm's length, each is not only entitled to make the best bargain he can, but to assume that the other fully understands and is the best judge of his own interests. If, on the other hand, the relation of the parties is such as to beget mutual trust and confidence, each owes to the other a duty which has no place as between strangers." The breach of this duty on the part of Mrs. Gray and her legal adviser towards the pursuer, her son, in this case consisted in their agreeing to prevent him from consulting an actuary or other independent adviser, and inducing him to repose implicit confidence in them; and into this trap the pursuer fell. In these circumstances the Lord President and the majority of the Court seem to have been justified in holding that "deceit or unfair dealing" had been proved. Lord Shand, however, with perhaps too great leniency to the parties complained of, based his judgment on the wider ground of undue influence, founding his opinion on

those general principles of equity which have long been recognised in England, though hitherto imperfectly apprehended in this country. "The defenders have maintained that the deed can only be set aside by a judgment which shall expressly affirm that it was obtained by fraud. They plead that there are two forms of issue and two only . . . applicable to such a case, in both of which fraud must be established, the first being whether the deed was obtained by fraud, . . . and the second, whether the pursuer was weak and facile in his mind and easily imposed on, and whether the pursuer's mother, taking advantage of his weakness and facility, did by fraud or circumvention procure the deed to his lesion." But, his Lordship continues, "I have not thought it necessary to affirm the existence of fraud, or to put the question for decision in either of the forms suggested. . . . The case is one in which confidence was invited and given, and parental influence unduly used by the pursuer's mother, with the assistance of her agent, to her own great advantage;" and on that ground his Lordship held the transaction to be reducible, without necessarily imputing fraud either to the mother or her law-agent, and certainly without pronouncing the pursuer to be weak or facile. Had the case been tried by jury, therefore, it is obvious that none of the old forms of issue would have been appropriate; but if it had been tried under one or more of these forms, it might not improbably have broken down. The issue really tried by the Court, and one which will doubtless be accepted as appropriate in future cases of the kind, was of a similar character to that adjusted in the case of *Harris* already cited, viz. "whether the deed was obtained by the pursuer's mother wrongfully and in violation of her parental duty," or simply "whether the deed was obtained through parental influence, unduly exercised to the prejudice of the granter."

To the old, strict, and in many cases too harsh forms of issue above enumerated there must therefore be added the new and more flexible form—"whether a deed prejudicial to the granter was obtained through the undue influence of a person standing in a confidential relationship towards him, and therefore falls to be reduced." This form has the obvious merit of being suited to the various requirements of the cases cited by Mr. Tudor, the propinquity or the confidentiality of the relationship being stated on record or in the issue in each case; and it would apply equally well to cases where the affection or the confidence of the aggrieved party had been so great as almost to amount to weakness or facility, and to those in which the ascendancy of the obtainer of the deed was such as almost to amount to circumvention or intimidation. The degree of confidence reposed by one party, and the extent to which it was abused by the other, are usually in an inverse ratio to each other in such cases; but in every case the question of fact would simply be, whether the granter was as fully aware of the effect of his deed, and as free and unfettered, as if the influence had not existed, or whether he remained in ignorance, or was placed at

a serious disadvantage, in consequence of the exercise of that influence. By this recognition of the principles which have so long ruled in the Courts of Equity in England our old system of issues has been widened and improved, the possibilities of a miscarriage of justice have been diminished, and contracting parties and the granters of gratuitous deeds have an additional guarantee that the arm of the law will strenuously defend them against any encroachment upon their freedom of action, however insidious or indirect. At the same time, it would be well that the profession should learn from the case which has formed the subject of these remarks, how important it is, in circumstances where influence arising from relationship or confidentiality subsists, that the person likely to yield to such influence should not only be made fully aware of his legal rights, but be placed in the hands of an independent adviser specially charged with the protection of his interests.

J. K.

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## THE LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR WORKMEN.

No one who has perused the valuable address by Lord Shand which was printed last month in the pages of this Journal can have failed to rejoice that the learned judge continues steadily to bring before the public in general, and especially before the more interested sections of it, certain views tending towards the solution of a problem worthy to be placed by no means far down among the most difficult of our day. Lord Justice Bramwell in England and Lord Shand in Scotland have devoted time, learning, and such leisure as the judicial bench may afford to its occupants, to a careful investigation of the questions raised, at once as in duty and by profession bound, from the purely legal point of view, and also in the aspect assumed by the subject when remedial measures and legislative intervention are contemplated. We cannot, however, fail to notice that certain considerations must always, in Great Britain at least, tend to affect the operation of any scheme of insurance such as that so admirably put by Lord Shand before the intelligent and technically well-informed audience he was addressing. It may be perhaps proper for us to sketch out, in the first place, the deductions we conceive to be drawn from his Lordship's remarks, and then to point out wherein we believe the difficulties lie in the way of carrying out what may be generally termed the assurance method.

Lord Shand, after discussing the existing state of the law, and after pointing out the difficulty of escaping from the conclusion that a master should be liable for the fault of a fellow-servant, whatever his grade, if we adopt the principle recommended in the Report of the Committee of the House of Commons, treats severally the proposals made for alterations of the law, referring to

the suggestions for legislation made by Mr. Macdonald, M.P., by Mr. Brassey, and by the Government measure. Lord Shand, however, regards as unsound any provisions which tend to make an employer responsible to his servant, "although he has been guilty of no personal fault or neglect;" and he further points out that it would be possible for a master to contract himself out of such liability. We think that as to this latter objection there would be serious difficulties in arranging such contracts. Nothing less than a printed form of rules would suffice, a copy being signed by each employé; but it may be doubted whether many masters would, in the face of a rule not merely judge-made, but laid down by statutory enactment, attempt any such evasion of responsibility. The method of the learned judge is insurance, and insurance of a mutual character, and its advantages are skilfully pointed out and illustrated. The funds would be provided, and provided for accidents alone, by master and by man contributing, as we understand it, to a Government fund. The existing friendly societies would be utilized if possible, but, as we shall point out subsequently, this would not be at all a simple matter, indeed we think it impracticable, owing to the varying character not only of the existing societies themselves, but of the relief they administer, such as aid in sickness, for funeral expenses, for death, for accident, in old age, etc. But Lord Shand is prepared evidently to pass compulsory laws if needs be, and herein we find another difficulty in agreeing with the scheme proposed.

Let us, however, turn to one of the chief obstacles in the path of any insurance scheme, or at least certainly in the path of any compulsory legislation with that object in view.

It must always be remembered that in this country we have in the first place a large, indeed a vast body of insurance societies, *malgré* the name. There are friendly societies properly so called, with their sister associations of the industrial and provident types, and further, there are numerous trades-unions with benevolent funds attached to them. All these organizations, if taken together, represent an enormous capital, and a most numerous membership; their incomes in the aggregate reach a large sum, and taken separately range from very moderate to very considerable figures; again, they have many of them numerous branches ramifying in all directions, each doing its work in a particular town, or county, or district; and, above all, not one trade but many trades are included, not one mode of relief in necessity is adopted but many modes of relief, not one variety of pecuniary difficulty is met by the subscriptions but almost every species. This peculiar, we may say unique, position of matters presents questions of real difficulty and of great delicacy the moment any attempt is made to alter the existing relations of employers and employed as to personal injuries or death incurred by the workman when pursuing his trade. It must be remembered that these societies are not the growth of yesterday, but have existed for the last hundred years or more,

gradually increasing in number and importance, and this fact makes change all the more serious. We have examined the reports of the Chief Registrar of Friendly Societies for the year ending 31st December 1878, which have but very recently been published, and we find that the number of friendly societies registered and certified in England alone during that year under the Acts specially passed for them was no less than 2255, including branches, etc., while trades-unions, etc., including loan societies and building societies, swelled the total to 2533. The number of societies actually in existence amount to many thousands, which have a membership of upwards of six millions of persons. These reports, indeed, in themselves afford an interesting comment on the scale on which these organizations have developed themselves, and called in to their aid the powers conferred by the Legislature. "Considering the calls upon public charity during the distress of the last few years," says the Chief Registrar, "on the one hand, and the exposures of mismanagement in charitable institutions on the other, it is difficult to understand why the promoters of charities should take so little pains to secure for the societies in which they are interested the advantages and securities of registry. These include henceforth for such societies the use of the public auditors' services at a fixed scale of fees." These remarks at once point to the existence of a large number of similar associations outside the duly registered bodies, and the consequent increase in the force to be attached to any arguments based upon already existing societies, having for their object either the direct insurance of their members or their indirect benefit in case of illness, accidents, and so forth. Of course many of these institutions are purely charitable, and as such do not fall within the scope of any remarks we make as to insurance in cases of injuries to workmen; at the same time they not inaptly illustrate the existence far and wide of certain principles of thrift and of self-reliance among the working classes, principles which we feel sure Lord Shand would earnestly desire to encourage, but which at the same time come, in their existing form at least, somewhat into collision with any system of compulsory insurance, or of thrift ensured by Act of Parliament.

It is a digression, we admit, but it is a digression surely to be pardoned among the legal profession, if we ask his Lordship to consider what the effect is of similar thrift enforced by statute among the Faculty of Advocates or Society of Writers to the Signet. Is it not a shameful tax imposed on the many for the benefit of the few? Is it not openly said to be a device to relieve the survivors from the importunities of the widow and orphans of the deceased? Is it not a closing up of the fountains of compassion and charity, and a pouring forth of the vials of austerity and wrath? So it is, and yet this self-same paternal or maternal legislation would be applied in some degree under an assurance scheme to every trade in the country. *Crede expertis*, things are not quite so easily arrayed as is suggested; even the very Germans themselves find that, and



they have not to contend, or rather when they legislated had not to contend against such an army of similar societies outside the pale of law or legislative sanction. If we turn to the work of Professor Brentano of Breslau University, with the euphonious and simple title of "*Die Arbeitsversicherung gemäss der Heutigen Wirthschaftsordnung*," we find that he points out some of the results of the German system of compulsory insurance for the purpose of protecting workmen in event of disablement, or their families in event of death, and when we are considering seriously any projects of this kind, we ought to pay some attention to the learned Professor's remarks. Mr. Ludlow comments justly upon the highly suggestive treatment this subject has received in the work we have just referred to, and we learn from Dr. Brentano that in his view the return from labour should, in order truly to repay the expenditure, cover "(1) the actual cost of maintaining the existence of the worker; (2) the cost of bringing up the number of children necessary for maintaining the requisite number of workers, and therewith the premiums necessary; (3) maintaining their children, in the event of the worker's early death, until they are capable of maintaining themselves; (4) insuring his life, and these already mentioned costs, in the event of premature disablement; (5) insuring a provision for old age; (6) insuring for maintenance, etc., in sickness; (7) insuring burial expenses; (8) insuring for maintenance in event of the failure of work." This last is a very curious and remarkable extension of the principles of insurance, and forcibly illustrates what we have just said as to all compulsory insurance. Not only in this way would Professor Brentano's model man have to save for all these death, sickness, and family contingencies, but he would have to lay by for the rainy day of dull times, bad trade, and no work. But no man could, model workman or otherwise, possibly insure, that is to say, make certain provision, out of his wages for all these things unless wages were very different to what they are, so different indeed that it would be impossible to pay for the magnificent products of such expensive labour. Perhaps too minutely, still with very trenchant observations, the learned author proceeds to show that mutual insurance is the only way in which these labour requisites we have enumerated can be secured; and he goes on to lay it down that there are no less than six kinds of insurance necessary for the working man, viz. (1) for death on the father's part; (2) for old age; (3) for burial expenses; (4) for permanent disablement; (5) for sickness; (6) for non-employment. To make such a system safe it must, of course, be universal, that is to say, national, and the author of the scheme thinks that the amount of the premium should bear a direct proportion to the risks. Of this it may be observed, that were that mode to be applied to the second and fifth kinds of insurance proposed, the older a man grew the larger would have to be his payments, as old age would be approaching nearer, and with it an increased likelihood of sickness, or in other words, as he grew less able perhaps to pay his premiums



would be increasing. While the existing societies present a difficulty sufficiently great under the plan advocated by Lord Shand, they would render any attempt to carry out Dr. Brentano's method almost impossible. This idea of insuring against non-employment must be complicated, for example, by giant problems in the shape of strikes and lock-outs. We have already shown one difficulty in the case of old age and of sickness, but it is not the only one, for we have already existing laws which compel children, when able to do so, to contribute towards the support of their parents, and further, we have an elaborate Poor Law system to meet cases of distress in this way. Now any such system of insurance must stand in the way of the complete carrying out of these laws.

Practically, then, in this country, were we seeking to insure, we should have (apart from the other considerations of existing societies) to provide for cases of death by the workman or his disablement, and we must endeavour to combine with this the existing societies as regards the work they do to meet expenses of burial, sickness, and disablement from advancing years. The German scheme so much admired and held up as an example has its defects, even from the compulsory legislation view. From the observations of Dr. Brentano we learn that in 1874 there existed in Prussia 2802 "Hülfskassen" (taking both those confined to particular trades and those not so limited), having a membership of nearly 270,000. In 1876 a law was passed which compelled every workman (not already enrolled in a duly registered friendly society) to pay contributions to the local sick society of his trade in the town in which he was employed. But this system, apart from its compulsory character and the objections to it upon that score, provides most inadequately for what is required, and acts apparently with gross injustice. No relief can be obtained by any member until he has made at least thirteen weekly payments; again, if he leaves the town in which he is located he can claim no relief, whatever the amount of his previous payments, after he has once exceeded the same period of thirteen weeks of absence. The result is that a man may have lived in Kiel say twenty years, and paid a large sum to insure himself against sickness under, be it always remembered, a compulsory system, and then when dull trade comes and he moves to Berlin in search of work, if he fall ill in thirteen weeks all his savings are thrown away, and he comes upon the poor's roll. In this country we should not for an instant permit such a law or such a state of matters; a revolution would be engendered in a very few years, and though the German system may have and is admitted on all hands to have its merits, in these points it fails lamentably. No doubt, with an oppressive military system, and an amount of espionage depending upon it to which we are happily strangers, this plan has its advantages. The workman is almost compelled, at the least has a very strong pecuniary inducement held out to him, not to move from his original place of work. It is easier there to mark

him down, to learn what he is doing, to track him and his children out for their destiny of military slavery. Again, strikes may thus be prevented from attaining any great force, as their area is limited by all such regulations. But the Professor goes further in his condemnation of the system, and says that all contributions by employers are practically nothing but deductions from wages which ultimately come out of the workman's pocket. That, however, is true under all and any circumstances; for if with Mr. MacDonald and some others it were made law that the employer must pay in all cases for injuries to workmen in their service, then it is equally certain that they could not afford to pay the same wages, and that the workmen who were not injured would indirectly pay for those who were. We have often read of cases where men, to avoid military service, have cut off their thumbs or otherwise mutilated themselves, and many a life insurance policy will be found to contain provisions excluding the heirs of suicides from the benefits of the insurance; now these cases appear to us to offer good illustrations of what might be expected to happen were any such Quixotic ideas to prevail. A man by a well-designed accident might provide for the future in a manner truly simple and truly efficient, but with a result in the aggregate fatal to the commerce of any country where such a law prevailed. It may be, and no doubt is true, that the German system is inadequate to meet the requirements it professes to do, but that is the case in any compulsory method. As to the fault in the learned Professor's opinion lying wholly with the absence of insurance for cases of non-employment, that is only a communistic idea, and utterly revolutionary both in theory and in practice. Capital and labour alike must suffer from periods of depression and rise in times of success, but in neither the one nor the other can compulsory thrift be made efficiently to tell. Any such legislation rapidly becomes tyranny if it is not so at the outset, and will fall and fall with a mighty rush, just as the sumptuary laws vainly again and again attempted in the earlier times of the world's history.

The true remedy is in liberty, and not in compulsory payments. The problem is to give liberty without licence. Develop the existing societies, protect their funds, punish those who defraud or injure them, widen, if you please, the area of an employer's responsibility, remembering that the true balance of capital and labour will always in freedom assert itself, and an arrangement may be reached such as will suffice for the wants of all. On the other hand, to compel payments by the workmen, even with parallel payments by the employers, is to take from them a tax in addition to that they already bear in paying to their voluntary societies, and to injure seriously these useful bodies.

Moreover, with trades-unions and other bodies which combine separate objects with their benefit funds, we should encounter another and most important form of opposition. It is not to be readily believed that these bodies will relinquish so important a

branch of their organization, and it is hard to give credence to any theory founded on the idea that these are one and all to be swept away if they refuse to yield. If there is to be any such plan of insurance it must be national, and it must be voluntary; were these two requisites attained it might work wonders, but we confess to absence of belief, and fear that at least in the direction of the German system our legislators must almost abandon hope.

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## EVIDENCE IN RELATION TO BILLS OF EXCHANGE.

THERE have been several recent cases bearing upon the question, under what circumstances is it competent to admit proof other than writ or oath to overcome the legal presumption which exists in favour of the holder of a bill of exchange? The rule that the acceptor must prove in a question with the drawer the want of value by his writ or oath has been declared by one learned judge to be "all but inflexible" (*per* Lord Medwyn in *Little v. Smith*, Dec. 9, 1845, 8 D. 265). At the same time this very case may serve to show that it is not inflexible, although, as admitted by another of the learned judges who decided it, "the exceptions must be rare and singular." The Scottish Courts received encouragement to relax this rule from the decision in the House of Lords in the case of *Hunter* (March 1834, Shaw's Sup. 130), when Lord Wyndford remarked that its blind enforcement, if generally acted upon, would be "a cover for every species of iniquity," and added, "Your Lordships will, I think, confer a great benefit on Scotland by giving your sanction to this precedent or to the judgment of the Court below in the present case."

In *Burns v. Burns* (July 20, 1841, 3 D. 1273) we have an instructive decision coming in point of time between those of *Hunter* and of *Little v. Smith*. In that case the pursuer, the drawer of a bill, sued the trustees of his deceased son who had signed it as acceptor for value received. At the time when the bill was drawn the pursuer was sequestrated, and had been incarcerated for debt. The son lived for two years after the bill became due, and during that time the pursuer brought an action of aliment against him, in which he described himself as a person reduced to poverty, but nevertheless made no mention of the bill, or of such a debt being due to him. On account of these and other similar circumstances the Lord Ordinary held that the bill must be looked upon as one signed without value, and this judgment was adhered to by the Inner House, although some of the judges seem to have come to their decision with difficulty. Lord Fullerton, while admitting that the proof or averment of fraud against the holder of a bill been held in some cases to let in an exception from the general rule, was inclined to draw a distinction arising from the

kind of fraud alleged, and to hold that the fraud must be that of the holder "either in the original contrivance of the bill, or in his acquisition of it by indorsation." That distinction is, however, repudiated by Lord Justice-Clerk Hope in *Little's* case, who points out that it was not adopted by the rest of the Court, and was irreconcilable with the interlocutor of the Lord Ordinary, in which Lord Fullerton concurred. One remark of Lord Fullerton's should be borne in mind in the consideration of this class of cases. He says, "Where a pursuer does not and cannot rest entirely on the general presumption that value was paid in cash, but states value to have been given in a particular way, the truth of these statements may competently be tested by their extrinsic consistency with each other on the admitted facts of the case."

A reference to recent cases will show that the general rule has not in modern practice been relaxed, and that it is only in suspicious circumstances, arising mainly from the statements or admissions of the party founding upon the bill, that proof other than by his writ or oath will be allowed. In the case of *Wilson v. Scott* (June 11, 1874, 1 R. 1003) the circumstances were these: the pursuer was the drawer and indorser of a bill; he petitioned the Court for recovery of it from a holder who he alleged had received it for a special purpose, and was retaining it improperly. On the other hand, it appeared, that this holder was the agent and custodier of a firm to whom the pursuer was indebted in a larger amount than that contained in the bill. In the Sheriff Court in which the action originated a proof of the distinct averment made by the pursuer was allowed and taken, and a decision given in his favour. But in the Court of Session it was found that his allegations could only be proved by the writ or oath of his opponents. Lord Ormidale remarked, "At first I had some difficulty as to whether a case of fraud is not in substance averred in this case, although the expression fraud is not used, and whether the respondents might not therefore be entitled to a proof *prout de jure*. But I very much fear that if such a proof were allowed in this case, every party who had granted a bill and who objected to payment of it might say to the holder, 'I gave you this bill for your accommodation merely, while you now attempt to enforce payment of it as if it had been given to you for value, and as this is a fraud I am entitled to a proof at large.'" It would seem from this remark that an express averment of fraud is in his Lordship's opinion sufficient to admit such a proof. In the opinion of the Lord Justice-Clerk, however, the result of the authorities is that even the "allegation of fraud with nothing to support it in the circumstances admitted or proved *scripto* is not sufficient to render parole proof competent."

The above case may be compared with the more recent decision in *Alexander v. Stewart* (Jan. 27, 1877, 4 R. 366). Here a proof was allowed because of the statements and admissions of the respon-

dent (the charger), which pointed to the bill being only a collateral security for another, and one of much smaller amount. "It is clear," says Lord Ormidale, "from what he (the charger) says, that he obtained the bill charged on in circumstances entirely foreign to those of an ordinary bill transaction. The suspender adhibited his name to a blank piece of stamped paper, and the charger filled it up for £35, although the bill which he says it was intended to come in the place of was an acceptance for only £14, 5s. But although in this way he obtained the new bill for £35, the charger also retained the old bill and discounted the new one at his bankers'." The charger here, it should be mentioned, in his charge made a deduction of the difference between the two bills. The principle of the case of *Brock v. Newlands* (11th Nov. 1863, 2 Macp. 71) was, as has been observed from the bench, "that an admission that a bill had to some extent been granted without value did not of itself deprive the charger of the presumption of onerosity as to the balance of the sum in the bill" (*per* Justice-Clerk Inglis in *Mercer*, Dec. 21, 1864, 3 Macp. 300); and Lord Gifford, in deciding *Alexander's* case, guards himself from "seeming to trench on the now recognised rule, that it will not weaken the privileges of a bill that the holder admits that only partial value was given for it. The balance will still be held as an approved debt against the acceptor, and as to this balance the *onus* will not be changed, and the rights of the drawer or holder will not be impaired any farther than his own admission goes."

In the case of the *City of Glasgow Bank v. Jackson and Others* (May 12, 1869, 7 Macp. 757) we have an instance of an admission by the holders of a promissory note as to the circumstances under which a bill was granted which was held insufficient to open the way to a proof at large. The pursuers here admitted that no present value was given for the note sued on, but explained that it was held as a security for the fluctuating balance which might be due on the cash account of one of the defenders, who at the date of the note was their agent. The defenders, on the other hand, said it was granted as a security for a *specific* amount of overdrafts due by him, and that the liability was extinguished by subsequent payments made by him into his account. It was clear that if the defenders were correct in this statement the liability had been extinguished. The sole question between the parties was whether this note was a security for a fluctuating or a specific amount. And how was this to be determined—by writ or oath of the pursuers or by a proof at large? Lord Barcaple, who decided the case in the Outer House, said, "The Lord Ordinary thinks that this is the only point of difficulty in the case. But he is of opinion that the contention of the bank is well founded. They are the holders of a note with the legal presumption of value in their favour, which in the ordinary case can only be rebutted by writ or oath. It is true that this rule has been equitably and beneficially relaxed in



some cases when there was something suspicious or irregular appearing on the face of the transaction, or when the presumption of onerosity was neutralized by the admissions of the holder or the unquestionable facts of the case. In such instances parole proof has been admitted though not without difficulty. But the present case is not of that kind. It is not alleged that there was anything in the slightest degree suspicious or irregular in the way in which the note was taken by the bank. Nor does their statement as to the purpose for which it was taken and held by them in any degree conflict with the presumption of onerosity." In his opinion there was nothing "in the aspect of the case to aid the demand for the relaxation of the ordinary rule of law as to the mode of proof." The decision was unanimously adhered to.

Where an indorsee was at once the agent for the indorsers and of the acceptor (the debtor) it was held that there was nothing in that fact to overcome the *prima facie* evidence that he was creditor in the bill (*Stiell v. Holmes*, July 7, 1868, 6 Macp. 994).

Where there are writings throwing light upon the true nature of a bill transaction, it will be competent to prove by parole facts relating to such writings. In the case of *Fraser v. Fraser* (Feb. 9, 1871, 9 Macp. 497) the pursuer, William Fraser, who was acceptor of a bill, sued the executor of the drawer for the amount contained in it, alleging that this bill was the renewal in part of another for a larger amount accepted by him to accommodate the deceased. He produced and founded upon a holograph letter which he alleged he had got from the deceased in exchange for the renewal bill. The letter contained an acknowledgment of having received an accommodation bill, and it bore the same date as the bill, but the pursuer admitted that this date had been filled in by himself. It was held competent to prove by parole the date of this letter—the fact of the bill in question being a renewal of one of earlier date, that it was identical with the one referred to in the letter which had been given in exchange for it. Lord Benholme remarked, "A holograph document in the handwriting of the drawer of the bill is produced, and if that document is capable of being referred to the original bill, then there is a material basis on which parole proof may be adduced to connect the one with the other, and there is no rule of law by which parole proof of the application of the document to the bill can be excluded." The above case, and still more clearly the case of *Thoms v. Thoms* (Dec. 20, 1867, 6 Macp. 174), establish that when a party founds upon a writing in order to show the true position which he holds with regard to a bill of exchange or promissory note, it is not necessary that this writing should be probative. In *Thoms'* case the pursuer, co-acceptor of a promissory note, having paid the full amount to the holder, sought recovery of this sum from the representatives of the other acceptor, deceased, and founded upon a writing in which the latter acknowledged that the pursuer was only security. This writing was not holograph,



but was signed by the deceased. The Court here drew an important distinction between writings by which a person becomes directly bound, and which form the substantive *vincula* upon which action may be raised, and those which are to be used merely as evidence of a fact.

From this brief review of the above cases it will be seen that the rule in question holds as strongly now as ever it did, in spite of the modern tendency to favour an unrestricted mode of proof. As to the exceptions, the best statement of the law seems to be that of Lord Barcaple's, already quoted, according to which there must be either something suspicious in the facts of the case—an admission which goes to rebut the presumption—or unquestioned facts having the same effect, and even then parole proof will be admitted with difficulty.

So much for common law. But what of statute? Does the 11th section of the recent Sheriff Court Act not apply to the case of a bill or promissory note? This is a question which, so far as we know, has not yet been distinctly raised. There seems little doubt, however, that it does. A bill is certainly a writing, and a liquid document of debt, and the section contains no exceptions, only it is clear that in the case of a bill, caution or consignation on the part of the objector would be ordered. If therefore the objector to a bill has only money or credit, he can now escape the restricted proof by writ or oath of his adversary, and by stating an objection on record, open the way to proof at large.

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## SCOTTISH AND ENGLISH LAW OF EVIDENCE AS TO THE ADMISSIBILITY OF STATEMENTS OF PER- SONS DECEASED.

THERE are not a few things in the English law and the methods of procedure of the English Courts which might with advantage be imported into the Scottish system of law and methods of procedure; but there are a great many more things which our southern neighbours might with advantage borrow from us. Already they have made great advances in this direction. The fusion of law and equity, which has led to an entire reconstruction of the English judicature, is an idea derived from Scotland, and in making that reform the English law tardily followed the example set in this country centuries ago. It is, however, in the department of criminal jurisprudence that the English lawyers have most to learn from us, and in which we have most indisputably a right to claim a decided superiority. It is almost inconceivable to us (or it would be, if we did not know the deep-rooted affection of the English people for conducting affairs in an anomalous and haphazard way) how they persisted so long in ignoring the necessity

of having a public prosecutor,—were so long in bringing themselves to see that it is not according to the “natural fitness of things” that there should not be a public official whose duty it is to prosecute crimes which are much more offences against society than offences against individuals. And if there is anything more surprising than this, it is that justice has managed *claudo pede* to stagger along somehow, and generally has succeeded in arriving at its destination without many serious capsize on the way after all.

We in Scotland cannot help being amazed at the crass and obstinate adherence of the English Courts to their system of rules of evidence—arbitrary and artificial rules which seem as if they had been expressly devised to exclude the light of truth from the case—rules which are all the more dangerous, because in new applications of them we generally find the decision deduced with an invincible logic, but deduced from a caprice. Take, for example, the subject of what in England is called “Dying Declarations,” to which our immediate attention has been called by the Bedingfield murder case, an article on which we recently extracted from the *Law Times* (see vol. xxiii. 644). The case has been the subject of a lively controversy (but chiefly on another point), which has interested the English legal world, and has surprised and amused the Scottish legal world; surprised, because the spectacle of an eminent judge throwing aside his judicial reserve and entering the lists against the newspaper assailants of his ruling is one to us unprecedented; and amused, because those familiar with the practice of the Scottish Courts cannot easily see how there was anything to have a controversy about.

In Scotland, in all cases, civil and criminal, the statement of a person whose evidence would have been admissible at the time he spoke may be proved by the evidence of those to whom it was made, if the person making it dies before the trial. This is not so much an exception to the rule that hearsay evidence is inadmissible, as an illustration of the principle on which the rule is founded. The statement of the deceased is not the best evidence that can be imagined, but it is the best evidence that can be obtained. Our Courts rightly regard as the best evidence the evidence than which no better can be had. It is different in England. “Proof of this description is admissible in no civil case, and in criminal cases only in the single case of homicide, ‘where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration’” (Taylor on Evidence, i. 606). Further, before being received the statement of the murdered person must be proved to the satisfaction of the judge to have been made under a sense of impending and, as Mr. Justice Lush said in one case, almost immediate death. The reason why such statements are admitted at all is, as stated by Chief Baron Eyre, “that they are made when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful con-

siderations to speak the truth." We are far from underrating the importance of this consideration. The fact that a statement is made under a sense of impending death may give an additional character of trustworthiness to it, but its absence is no reason for excluding the statement altogether. In *Bedingfield's* case the absurdity of the English prohibitory rules was most glaringly illustrated. The leading circumstances of the case we may briefly recall. On the day of the murder, the prisoner and the woman he killed had an altercation in the house of the latter. The man left her, got a razor, returned to the house, and shortly after a loud scream was heard from the woman. She was immediately after seen coming from the house with her throat cut, bleeding profusely, and seemingly very much frightened. She was met by two women, who led her back into the house, where she died ten minutes afterwards, having, after she lost the power of speech, continued to point to the room in which the prisoner was. He was found lying on the floor with his throat cut also, but not so severely. A razor was found under his hand. The defence was that the woman attempted to murder the man and then committed suicide. But the evidence against the man was by the jury held conclusive. There was, however, one piece of direct evidence—the only piece of direct evidence in the case—which was excluded. When the injured woman met the two women after she left the house, she made a statement the nature of which was pretty well known before any authoritative intimation of its import was given, but which the Lord Chief Justice now informs us in his recent pamphlet was, "Oh dear, aunt! see what Bedingfield has done." The judge refused to receive this statement as a dying declaration, for it was not shown that the woman when she made it was aware that she was dying. And according to the rule of English law, it was rightly rejected, because the poor creature in the perturbed state of her mind could have had no deliberate thought as to what was to happen—whether she was to live or die, or whether if death were to ensue it was imminent or remote. An attempt was made to get in the statement as part of the *res gestæ*. The scream of the woman, said Chief Justice Cockburn, was part of the *res gestæ*; but the statement made a minute or two after, was made too late to form part of the *res gestæ*, having been made "after all was over." It is difficult to see how "all was over." To any ordinary mind it would seem that the statement made so soon after the act of violence, and when the woman was in a state of agitation caused by that act of violence, was part and parcel of the affair. And what strikes us as singular is that while the articulate statement, the import of which was not doubtful, was rejected, the gesture of the woman in pointing to the room where the man was, the significance of which might be disputed, made *after* the statement, was not rejected as too late to form part of the *res gestæ*. The Chief Justice regretted that the law compelled

him to reject any piece of evidence, but the state of the law was such that he could not help rejecting evidence of the woman's statement. There is no more pitiable spectacle presented in a court of justice than that presented when a judge acknowledges that the law is in such a state as to compel him to reject evidence which is all-important, and which every principle of common sense induces him to accept. To our mind no case could more illustrate the artificial and arbitrary nature of the rules of evidence which prevail in the English Courts, and the crass and obstinate spirit in which the English lawyers adhere to them,—acknowledging that they are galled by the fetters that bind them, and making no attempt to have them removed.

In Scotland, in such a case, a different result would have happened. Evidence of the statement made by the injured woman would have been received at once and without question. There would have been two separate grounds for receiving it. In the first place, it would have been received as the best evidence obtainable,—the woman being dead. In the second place, it would have been received although the woman had lived and been a witness; being made *de recenti* after the outrage. Mr. Dickson in his book on Evidence refers to the principle “which in criminal cases admits proof of statements made by the injured party *de recenti* after the alleged crime. Such expressions being the natural outpourings of feelings aroused by the recent injury, and still unsubsidied, are a consequence and continuation of the *res gestæ*, and corroborate the party's evidence for the Crown” (Treatise on the Law of Evidence, i. 82). Again he says, “The law of this country does not recognise the distinction taken in England by which proof that the injured party stated *de recenti* he had been robbed, or the like, is admitted while proof that he named the assailant is excluded” (i. 83).

Lord Chief Justice Cockburn's ruling that the statement was not part of the *res gestæ*, has been in England questioned on the authority of English cases by many critics. Chief among the foes has been Mr. W. Pitt Taylor, the author of the well-known book on Evidence. The Chief Justice has published a pamphlet in reply, and Mr. Taylor has published a rejoinder in which he has made several very palpable hits. It is not usual for a judge to reply to strictures upon his ruling on a point where life and death are concerned; as it was in this case, according to the opinion of the Chief Justice himself at the trial, where he said, if evidence of the statement were received “it might have a fatal effect.” At any rate if a reply is to be made, the reply should be crushing. It is crushing—in a way. Upon the question, what is the meaning of the term *res gestæ* as applied to a criminal case, the Chief Justice says:—

To this I should propose to answer thus: Whatever act or series of acts constitute, or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused, from its inception to

its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or the wrong-doers in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it—including herein what may be said by the suffering party though in the absence of the accused, during the continuance of the action of the latter actual or constructive—as, *e.g.* in the case of flight or applications for assistance—form part of the principal transaction, and may be given in evidence as part of the *res gestæ* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer—actual or constructive—has ceased through the completion of the principal act or other determination of it, by its prevention, or its abandonment by the wrong-doer—such as, *e.g.* statements made with a view to the apprehension of the offender—do not form part of the *res gestæ* and should be excluded.

Mr. Dickson says, in the work already cited, in reference to the subject of *res gestæ*, “The admissibility of statements on this ground is determined by the judge according to their connection with the relative facts, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description” (i. 80). In matters of this kind where it is difficult to lay down precise rules, it is better not to attempt to do so. Success is hardly possible, and an unsuccessful effort entails the hazard of embarrassing the judges in future cases. We do not think the Lord Chief Justice has been fortunate in his attempt to lay down, in a manner worthy of a schoolman of the middle ages precise definitions on a subject confessedly difficult of definition. His distinctions are artificial, the statement of them is involved, and the whole scheme, while affecting to be elaborately precise and all-comprehensive, fails to afford any rule in cases which are obvious and which are suggested by the case in hand. What seemed far from clear before appears much more puzzling now. In another passage the Chief Justice says, “A man finds himself waylaid by another who makes a murderous assault upon him; whereupon, succeeding in making his escape, he flies, and outrunning his assailant applies to the first person he meets for protection, stating what has happened, and who it is that has assailed him, and from whom he apprehends danger. In such a case I should have no difficulty in holding the statement so made to be properly part of the *res gestæ*.” We put this query, Suppose a person assailed believes that the assailant is following him when he is not, is a statement made by the former after “all action has ceased” on the part of the assailant admissible as part of the *res gestæ*? The Chief Justice speaks of statements being inadmissible when made after all action on the part of the wrong-doer has ceased, as by abandonment of the principal act; but he says they are admissible in the case of flight. It has not occurred to him that there are cases where the two elements of flight of the assailed and abandonment of his purpose by the assailant are combined.



In reference to the case before him his Lordship says the woman when she made the statement was not "running away from an assailant. She had left the assailant lying in her front room with his throat cut, which, as appeared from her gestures when brought into the house, she perfectly well knew." The gestures, as we have already remarked, both from their being later in point of time and from their being of less unmistakable import, were much more admissible than the statement. His Lordship further says, from the moment the assailant cut his throat and fell to the ground "all action on his part ceased." But how do we know the precise moment at which the assailant cut his throat and fell to the ground? And how do we know that the woman was aware that he had done so, and that all action on his part had ceased? Are we to suppose that the woman waited to see the man cut his throat before she went to be out of his reach? Or even assuming that the man's throat was cut before she left the room, is it not reasonable to suppose that the woman made off as soon as she could after the injury was done to her, thinking of her own condition, and not noticing or caring to notice the condition of anybody else? Further, how do the gestures of the woman in pointing to the front room show she was aware that the assailant was lying there with his throat cut? The gesture might mean many things; but the only safe meaning to draw from it is that the assailant was in the place to which she was pointing. As to what was to happen to the man, if she thought of this at all, it is more likely that it was to the apprehension of the man rather than to his assistance that she was directing attention.

The position which the Lord Chief Justice has taken in entering into this controversy is not a dignified one; and the controversy itself is not a useful one. We have no inclination to enter fully into the discussion about what comes within the limit of the *res gestæ*, or whether the Chief Justice was right or wrong in his ruling on the subject; although it seems to us clear that a statement made so recently after the outrage ought to have been received. The question whether a particular judgment is right or wrong is of little moment compared with the question whether the principles of evidence to be applied are right or wrong. Nor do we think the point of chief importance in the case is that about the *res gestæ*, a subject as vague and undefined as the distinctions drawn upon it by the Chief Justice are minute and metaphysical. One thing that strikes us in this controversy is this: it never seems to have occurred to the principal antagonists that the law of England is radically wrong in not at once, and as a matter of course, admitting evidence of the statement of the deceased woman as being the best evidence that could be got. If the law of England had admitted such evidence, all these difficulties about the *res gestæ* would have been avoided. Instead of waging this fiery controversy about the ruling in a particular case, we think the



critics and the criticised might have been better engaged in taking the lesson of the case, and endeavouring to have the English law on the subject altered so as to put it in accordance with the law of Scotland and the principles of common sense.

The tendency of our Scottish law, at least in recent times, has been to remove restrictions on the admissibility of evidence—to let in everything connected with the case as evidence, and to take it for what it is worth. We have made many advances in this direction; we may have more to make; but we are still a long way ahead of our English neighbours.

### WHAT JUDICIAL FACTORS CAN BE APPOINTED BY SHERIFFS, AND HOW THEY MAKE UP A TITLE.

IN treating of the jurisdiction of the Sheriff Court the last Law Courts' Commission (with Lord Colonsay at its head, who prepared its report) reported (Fourth Report, dated 12th July 1870, p. 31): "The power of appointing tutors, *curators bonis*, and judicial factors has hitherto belonged exclusively to the Supreme Court, though services of tutors could proceed before the Sheriff. In regard to small estates there would undoubtedly be a convenience in allowing these appointments to be made by the Sheriff; and it has been suggested that he should have power to make them wherever the value of the estate, heritable and moveable, is sworn not to exceed £1000. All such officers when appointed should be under the superintendence of the Accountant of Court. Where cautioners for such officers appointed in a Sheriff Court are not resident within the jurisdiction of the Sheriff, it will be necessary that they bind themselves to submit to its jurisdiction."

This statement as to the exclusive jurisdiction of the Supreme Court is borne out by all the evidence taken by that Commission, which included evidence as to the jurisdiction of the Commissaries which has been combined with that of Sheriffs by 4 Geo. IV. c. 97, 1 Will. IV. c. 69, 6 and 7 Will. IV. c. 41, 13 and 14 Vict. c. 36, and 39 and 40 Vict. c. 70. Section 35 of the last-mentioned Act is very explicit. By it "the whole powers and jurisdictions of the Commissary Court in each commissariat shall be and the same are transferred to the Sheriff in office at the commencement of this Act, as the Commissary of such commissariat who shall thereafter, and his successors in office, as Sheriff possess and exercise the whole of the said powers and jurisdictions in all respects."

The statement of the Law Commissioners is, moreover, in consonance with the *dictum* of the Court of Session in *Greenhill v. Gordon* (11th March 1823, 2 S. 291), "that a 'judicial factor' could be appointed only by the Court."

This is all the more remarkable that Sheriffs have had a recognised jurisdiction in appointing officers identical with judicial factors. In *Drysdale v. Lawson* (11th March 1842, 4 D. 1061) a judicial factor on a dissolved partnership was sought from the Court of Session; but as there was a litigation in dependence before the Sheriff, the Court refused the petition, "without prejudice to either party, to apply to the Sheriff to appoint a person properly qualified to take charge of the property in question for its management and preservation." These are almost identical with the words of the Act of Sederunt of 13th February 1730, which narrates that "the Lords of Council and Session have been often applied to for appointing factors on the estates of pupils not having tutors, and of persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates, *to the end* that the estates of such pupils or persons may not suffer in the meantime, but be preserved for their behoof and of all having interest therein."

Besides this power of appointing factors or managers, Sheriffs have had recognised a power to provide for the management of estates involved in a litigation before them which has been removed by appeal—formerly advocacy—to the Court of Session. Thus the Act of Sederunt of 10th July 1839, by section 130, provides that "in all advocations of interlocutors pronounced by Sheriffs it shall be competent for the Sheriff to regulate in the meantime, on the application of either party, all matters respecting interim possession, having due regard to the manner in which the interests of the parties may be affected in the final decision of the cause." This existing right was made the subject of statutory enactment in the Court of Session Act, 1868 (31 and 32 Vict. cap. 100, sec. 79), the words of the Act of Sederunt being almost repeated, with the addition, that "such interim order shall not be subject to review except by the Court [of Session] at the hearing of such appeal, when the Court shall have full power to give such orders and directions in respect to interim possession as justice may require."

Another set of judicial factors now falling to be appointed by Sheriffs passes unnoticed by the Law Commissioners. The late Mr. Alexander, W.S., Clerk to the Commissary Court of Edinburgh, in his "Practice of the Commissary Courts in Scotland," published in 1859, states that "the jurisdiction now left to the Commissary Courts in Scotland is limited to decerning and confirming executors to deceased persons having personal property in Scotland, and relative incidental matters, such as applications for the protection of the property of the deceased till an executor is confirmed, the exoneration of executors and their cautioners, and the appointment of factors for minors *quoad* executry funds." The form Mr. Alexander gives in his appendix of a petition (p. 193) to the Commissary for the

appointment of a factor supplies some more information as to this jurisdiction. It narrates, in justification of the prayer, that the deceased had not "nominated executors, or appointed tutors and curators to his children after named; that E. B., wife of the said D. B., predeceased him, and the issue of the marriage are P. B. and R. B., both in pupillarity; that the said children have not that *status*, in consequence of their pupillarity, which entitles and qualifies them to administer the personal estate of their deceased father, and it therefore becomes necessary that a factor be appointed to them for the purpose of managing, ingathering, and administering the personal estate of the said deceased D. B. for behoof of the said pupils and all interested." Following this subsumption there is the prayer for appointment of the factor, "with power to him to have himself decerned executor-dative to the said deceased *qua* factor foresaid."

This power to the factor to get himself and not his pupil wards confirmed seems at variance with the principles which have been affirmed by the Court, one of which cases, *Reid v. Turner* (23rd June 1830, 8 S. 960), is quoted by Mr. Alexander himself (p. 46). "Also," he says, "it would appear a pupil, although he must pursue through his administrator-in-law, may be decerned and confirmed executor," giving *Reid v. Turner* as his authority.

This point also emerged in the case of *Johnstone v. Lowden* (15th February 1838, 16 S. 541), where the broader question of the competency of such appointments by the Commissary (now the Sheriff) was discussed and decided in favour of such appointments in the case of both minors and pupils. The appointment in *Johnstone's* case had been made by the Commissary of Kirkcudbright, the minor, who was fifteen, having previously been *decerned* executrix-dative *qua* nearest of kin to her deceased sister. Upon being so decerned executrix the minor and her mother presented a petition setting out "that being only about fifteen years of age the said Jane Johnstone is not qualified to make up inventories of the moveable estate of her said deceased sister, or to make oath thereto, and as the other petitioner, her mother, is willing to act as factrix for her, and to take the office of executor upon being authorized by your Lordship, the present application is rendered necessary." In terms of the prayer Mrs. Johnstone was accordingly authorized "to be factrix for the said Jane Johnstone, and to give up inventories, and to confirm in her own name as factrix for her, upon her finding caution to make the sum confirmed forthcoming to the said Jane Johnstone and all concerned in ordinary form." A report on the practice of the Commissary Court of Edinburgh was obtained, and the reporter, the then Commissary Clerk, Mr. Carphin, drew attention to the difference in procedure which obtained in Kirkcudbright and Edinburgh. It differed "in so far as the minor, Jane Johnstone, was decerned executrix *qua* nearest of kin to said Catherine Johnstone, her sister, and that Mrs. Isabella Johnstone, her mother,

was *afterwards* appointed her factrix, in place of the factrix for the minor being appointed by the Court, caution found, and an act and factory extracted *previous* to the edict being moved for decerniture, and the factrix decerned executrix-dative *qua* factrix, for behoof of all concerned."

Two of the four eminent judges, who were unanimous in their judgment, deal specially with this point of the decerniture of the minor as executrix. Lord Corehouse remarked: "I have had occasion to see minors decerned and confirmed executors again and again, and it appears to me to be perfectly regular so to decern and confirm them."—"Now supposing that any irregularity had occurred in expediting confirmation, there would still remain the decree by which the pursuer was decerned executrix-dative to her deceased sister, and that alone would give her a sufficient title to pursue and to obtain decree, only under the condition of her confirming before extract."—"It was competent to originate the procedure at her instance, and to decern her executrix-dative *qua* next of kin. It was on her prayer that sentence of confirmation passed in favour of her mother *qua* factrix for her, and if it be competent to confirm a factor at all, it appears to me that the factrix was regularly confirmed in this instance." The Lord President (Hope) goes a much greater length in following out this principle, and points to another class of factors being appointed in the Commissary, now the Sheriff, Court. His Lordship said, "I am of the same opinion. If a person who is major and has been decerned executor-dative has occasion to go abroad, it is competent for him to grant a commission and factory in favour of a party, who may thereon be confirmed *qua* factor for the executor-dative. And if that be competent, the procedure in this case was valid and regular." And such was the decision in *Johnstone v. Lowden*. So far as we can at present learn, no factors and commissioners have ever been confirmed executors *qua* factors for the executor-dative; but in Edinburgh, if the factor and commissioner is the petitioner along with the absentee, the absentee will be confirmed executor, and the factor and commissioner will be allowed to make the necessary oath to the inventory of the estate.

Professor Montgomerie Bell, in his "Lectures on Conveyancing" (2nd edition, vol. ii. p. 1121), calls attention to Lord President Hope's remark, stating that confirmation by such a factor is "an arrangement which may in some cases be convenient. It would be necessary for the factor to hold special powers; though perhaps power in express words 'to expedite confirmation' may not be indispensable."

The decision in *Johnstone v. Lowden* on the point of the competency of the appointments to which it relates has not been accepted without hesitation in some quarters. The Commissary-Depute at Dunblane (Mr. Grahame), on 2nd August 1870, refused a petition (Drummond) as incompetent. He added in his note:—

Apart from the authority exercised by the bishops in early times as Commissary judges, there appears to be nothing to support the view that the lay-judge, to whom the discharge of the office of commissary has now been intrusted, can take upon himself what according to the principles of our law, as long recognised, and lately given special effect to in the Pupils' Protection Act, belongs exclusively to the Judges of the Supreme Court. In one case, indeed, viz. that of *Johnstone v. Lowden*, etc., 15th February 1838 (16 Shaw), an appointment of a factor to a minor by a Commissary Court was apparently recognised as not necessarily invalid, but an examination into the circumstances of that case and the grounds of action, and the opinions of the judges, will show that the question of the authority of the Commissary Court to appoint to the office of factor was not made matter of decision. The pursuer in that case was a minor who had been decerned executrix-dative to her sister, and who had in that character, along with her curators and her mother (who had been appointed factrix to the effect of being confirmed to act for her said child under the executry), asked for payment of a legacy due to the executry. The judges held that the minor had a good title to demand payment of her sister's legacy "as sister and executor-dative *qua* nearest in kin," and on that ground alone sustained the title of the minor. Were the appointment of factor by the Commissary Court to be recognised as legal, and were it generally acted upon, means would be afforded of nullifying to a great extent the safeguards intended to be given to the public by the provisions of the Pupils' Protection Act, the policy and intention of which is that parties holding the office of judicial factor shall be responsible to the Court of Session for all their intromissions with and management of the pupil's estate, and the performance of every duty incumbent on a party holding the office of judicial factor. The special protection which was intended to be given to pupils by the appointment of an Accountant of Court, who should superintend generally the conduct of judicial factors, would thus be lost in the case of all factors appointed by the Commissary, and the estates of pupils might thus, under the colour of an appointment obtained by a party, with the pretence of his afterwards getting the office of executor, be mismanaged. Taking, then, into account the fact that the authority which is claimed for the Commissary Court in regard to the appointment of judicial factor had an ecclesiastic and episcopal origin, which it has not been the policy of recent legislation to recognise, and that the Pupils' Protection Act is founded on the principle that the Court of Session is the protector of all pupils, the mere *obiter dicta* of some of the judges, on a point which they held not an essential one in the case before them, do not appear to be of sufficient authority to warrant the Commissary Court to grant the extraordinary powers involved in the appointment now prayed for.

The petitioners appealed against the interlocutor, and the Commissary (the late Mr. Tait) reversed, issuing the following note:—

The Sheriff-Commissary has made special inquiry as to the practice in this matter in the different commissariots. He finds the appointment of factors, with a view to their being decerned executors, where the nearest of kin is a pupil, and where there is no widow of the deceased, is universal; and in the commissariot of Edinburgh there are instances of this having been done within the present year. It is possible that since the passing of the Pupils' Protection Act, the Court of Session may find that they only are competent to appoint factors in such circumstances, but they have not as yet done so, and seem hitherto to have acquiesced in the continuance of the ancient practice. The commissary clerks must no doubt look well to the sufficiency of the security found, and if that be done there may be an advantage, where the executry is small, in the appointment being made by the Commissary in whose Court the proceedings as to determining executor and confirmation are to take place, instead of a more expensive application to the Court of Session. After due intimation is made, the propriety of appointing the person proposed in the petition, or some other person, to the office of factor will be considered.



It is stated in the answers for William Moir the compeerer that he himself, as the paternal uncle of the pupil, has presented a petition praying that he should be decerned executor to his deceased brother, and that the said application has been sisted, until the present petition is disposed of. Seeing that Alexander James Moir, the pupil, is the son and nearest of kin of the deceased, the Commissary does not see how the brother can be decerned executor unless he has first been appointed factor for that purpose. But there is nothing to prevent him from presenting a petition that he should be appointed factor; and if he does so, that petition may be considered along with or even conjoined with the present petition. Probably an agreement may be made between the parties, the only object being that the executry be secured, and the confirmation proceeded with, for the benefit of the pupil.

As illustrating the views of the Commissary-Depute of Perthshire as to the advantage which might be taken of such appointments to prejudice instead of advancing a pupil's interests, and also showing opposite views as to the grounds and effect of the decision in *Johnstone v. Lowden*, we give the interlocutors in a case before the Commissaries of Edinburgh in 1876, where the petition (Skirving) for a factor was refused:—

*Edinburgh, 26th February 1876.*—The Commissary-Depute having considered this petition and production, and heard the solicitor for the petitioner, Refuses the prayer of the petition and decerns. FREDERICK HALLARD.

*Note.*—The circumstances of this case as disclosed in the petition exhibit an estate of which the solvency is doubtful, and where the step proposed to be taken is one primarily for the benefit of creditors. The interest of the pupils comes only in in the second instance. This is not the kind of case in which, according to the practice of this Court, a factor for pupil children is named to be thereafter confirmed as executor in their behalf. The interest of the pupils here seems merely the pretext to cover that which is the true and substantial interest in this application, viz. the interest of creditors.

The proposed factor, a professional man and an utter stranger to the family, has presumably no motive for the performance of the duties of what is understood to be a gratuitous office. Mr. Skirving would seem the much more natural guardian of the interests of the children, and has not alleged any sufficient reason why he should not himself be appointed. F. H.

This interlocutor was appealed, and the following was the judgment of the Commissary:—

*Edinburgh, 15th March 1876.*—The Commissary having considered the appeal for the petitioner with the minute of meeting of creditors produced, and heard counsel for the petitioner, Dismisses the said appeal and decerns.

ARCHD. DAVIDSON.

*Note.*—This is a most unusual petition, though not incompetent. It is obvious the application is made for the benefit of the creditors of the deceased and not in the interest of his children. The Commissary concurs entirely in the grounds stated by the Commissary-Depute for refusing the prayer of the petition. A. D.

That the evils attending such appointments are not non-existent is attested by the fact that in Edinburgh none of the factors appointed there have ever lodged accounts or come back to account and get a discharge. But we must refrain from further notice of this interesting subject until a future number.

(To be continued.)



## POOR LAW INSPECTOR.

THE Poor Law Inspector is no doubt entitled to public sympathy and support. He has a great deal to do, and much of it is often thankless and disagreeable work. Every claim which a vagabond makes for relief he must inquire into. All the permanent paupers of the parish he must visit twice a year, even though they live at some distance from the parish. He is liable to be called out at all times and in all weathers, and for reasons which frequently are found to be the reverse of urgent. The occasional custody of a drunkard or a madman varies the monotony of his life. His record of applications, his register, pay-roll, and visiting-book, make together a dismally minute history of the pauperism of the parish. When some dying unfortunate actually dies before food has come from the poorhouse, he may be proceeded against at criminal law. But of all the hardships of his lot, sometimes the greatest is this, that he has to serve two masters. He is appointed and his salary is fixed by the Parochial Board, but he can be removed only by the Board of Supervision. To both authorities he must report on his local administration, and to both he must yield obedience in a number of miscellaneous matters which have never been very clearly defined. This policy of the great Poor Law Act of 1845 is no doubt a wise one. It protects the inspector against the real tyranny or caprice of the local board, and in his person, so protected, it to some extent secures the efficient management of the poor against the cheese-paring tendencies which in parochial elections too often prevail against a sounder economy. In normal circumstances it must promote peace and harmony in the administration of the Act. The local board will treat their independent servant with greater forbearance and respect; while he, on the other hand, is less likely to be seduced by motives of self-interest from a fair and upright performance of duty. But when the authorities begin to differ, the position of the inspector is embarrassing. The superior or central authority will in the majority of cases be upon his side, but, although he knows that his legal position is secure, he cannot enjoy the prospect, and can derive no advantage from the process, of quarrelling with those under whose immediate superintendence all his work is done. Fortunately, however, there are not many actual collisions between the supervising and the local boards. This is no doubt due to the tact and temper with which the duty of superintendence is discharged. But now and then there comes a jar in the machinery, and the public obtains a glimpse of the internal working of the Poor Law.

In the *Old Monkland* case, which was before the Court of Session last month, the sympathy of the public will certainly follow the judgment of the Court and be given to the inspector.

Mr. Campbell was a public servant of twenty years' standing. He had successfully managed the poor law business of a large and rapidly increasing parish. He had received repeated advances of salary, but after all he is now enjoying only £200 a year, with a house and the usual allowances. He seems, however, not to have been on the best of terms with his board, for they recently took advantage of a change in the assistant inspectorship to reduce Campbell's salary by transferring £20 of it to the new assistant. But there was a faithful minority, a Campbell party, in the board who brought this proceeding under the notice of the central authority. They represented the inspector as the victim of a "protracted system of persecution," and invoked his protection "from the blasting and deadly influences of party spleen." The Board of Supervision found on inquiry that Campbell was in vigorous health, and in every respect as efficient an inspector as at any previous time. They accordingly told the inferior board that the resolution to reduce his salary was illegal, and as the resolution was not rescinded, they brought them before the Court. This they are entitled to do only when the Parochial Board refuse or neglect to do what the law requires of them, or when any obstruction arises in the execution of the Act. The Court have now ordered the diminution of salary to be cancelled, and no doubt this is a most wholesome decision. Mr. Campbell was blameless, while his employers shuffled disagreeably through the whole business, representing at one time that Campbell was personally inefficient, at another that they merely wished to make a readjustment of the duties of the staff. But it would at the same time have been desirable if the Court had expressed a little more distinctly the precise grounds on which their interference with the local authority proceeded. Such applications are rare; they have been more common under the Public Health Act than in connection with Poor Law matters, but in previous cases the reason of interference has been plain. An appointment not justified by statute has been made; or an officer, dismissed by the central authority, is continued in his office. But in the *Old Monkland* case the question will no doubt be put, What legal duty had the Parochial Board failed to perform, or in what way were they obstructing the execution of the Act? The Court explain that they do not proceed upon the principle that the salary of a public officer cannot be reduced. Indeed the Board of Supervision claimed a right to consent to a reduction of salary. Still more certainly, the Court do not proceed on the principle that such a consent is required to make a reduction of salary legally possible. But they seem to have acted on a general impression that the parochial authority were in bad faith; that they had formed a design to get quit of their inspector; and that the reduction of salary was really a covert dismissal. The jurisdiction which the Court have exercised is of a very delicate and important character,

and it is unfortunate that the general principles on which it rests should not have been more distinctly stated.

It speaks well for the wisdom with which the Board of Supervision have done their duty that there seem to be in the books only two recorded cases in which they have been compelled to apply to the Court under the 87th section of the Act of 1845. The first of these was that of the *City Parish of Glasgow* (1st February 1850, 12 D. 627). The Parochial Board of that parish had appointed an inspector in terms of the Act, and they afterwards appointed an additional officer under the same title to take charge of part of the duties committed by the statute to the inspector. One man was to consider the claims of about 7000 paupers, the other to collect and expend an income of about £98,000. The Court found that the appointment was illegal and irregular, and was an undue obstruction to the execution of the Act. Assistant inspectors might be appointed under the principal; or if a parish was too large it might be divided, but in each poor law district there must be in one person an undivided responsibility towards the Board of Supervision. Lord Mackenzie in his opinion seems to express approval of what the Parochial Board had done as a convenient arrangement for the transaction of business, but he strongly points out the general inconvenience which would result in the administration of the Act if every Parochial Board were to disregard the statutory definition of an inspector's duties, and to make a special definition of those duties for each man whom they chose to appoint. It would certainly cause a good deal of litigation; and in the *Glasgow* case, as one of the two inspectors was to conduct the whole correspondence, the Board of Supervision would be placed in the awkward position of corresponding with one inspector about the work done by another. The second case is that of the *Parish of Dull* (9th June 1855, 27 *Jur.* 425). Here the Parochial Board dismissed their medical officer on the ground of neglect of duty. Shortly afterwards they reappointed him. The Board of Supervision then made inquiry and dismissed the medical officer, but the inferior board again appointed. The result was the same as in the case of *Glasgow*. In each case the appointment was held on a consideration of the statute to be illegal. The Board of Supervision have not the same power over medical officers as over inspectors, but here their action was justified by the fact of the Parliamentary grant being received. This is under a minute of the Board of Supervision sanctioned by a Secretary of State. Even were it otherwise, the continuance by the Parochial Board in employing a person whom they had by formal minute pronounced to be unfit for the office, might still have been represented as an obstruction to the Act. The cases of *Glasgow* and *Dull* are therefore clearly distinguishable from that of *Old Monkland*, for in the latter an inspector, whom the Board of Supervision declared to be competent, was doing his work and had not resigned. If the

inspector does not resign on his salary being reduced, it is difficult to understand how the question of the legality of the reduction can be evaded. If it were raised, the issues would be seen to be of a very serious and wide-reaching character. If an inspector's salary cannot be reduced, even in connection with a re-adjustment of parochial duties, it must be because it is not a salary, but an emolument belonging to a public office. What then is a public office? Is it not sufficient that the employed is a public authority? Is it sufficient that the duties are defined by statute? Clearly not. In the case of the inspector, because the right to dismiss is separated from the right to appoint, can any conclusion be drawn with regard to the inherent rights of the office? We think the whole controversy must turn on the construction of the statute, and that in so far as matters are not expressly regulated by statute, the principles of the common law relating to the contract of service must apply. Is there a common-law definition of a public office? Is it not confined to a number of well-known existing offices?

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### Correspondence.

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#### ACCURACY ABOUT ADJUDICATIONS.

*(To the Editor of the Journal of Jurisprudence.)*

SIR,—I find I must trouble you with a few words in reply to Professor Mackay, but they shall be the last which I shall write on the subject, and shall be strictly confined to the questions raised by the attack which Mr. Mackay made, in his work on Practice, on the accuracy of a passage which he quoted from mine. Let me remind your readers for a moment what those questions are.

In my work, when considering whether adjudications should be raised in the Sheriff Court or in the Court of Session, I said that "all adjudications in use were at one time competent in the Sheriff Court." The time to which I referred was admittedly the period before 1672. This passage Mr. Mackay quoted, making on it the brief comment that there was "no authority" for it. The questions thus raised were two: firstly, What were the adjudications in use before 1672? and secondly, Were they competent in the Sheriff Court?

Two other questions were incidentally raised, which I mention merely to show that they require no further discussion. Immediately after saying there was no authority for my statement, Mr. Mackay added a sentence, which I understood at first to be in justification of his contradiction. Mr. Mackay having, however, explained that that sentence was to be read as referring to the practice after 1672, I have no farther concern with it. The next

question which may be dismissed is one which was raised as to my meaning. Mr. Mackay says in his last letter that I have corrected my original statement. That is a mistake. All that I have corrected is a misapprehension which surprised me. Mr. Mackay gave a meaning to my words which tried to fasten on me the absurdity of saying that certain kinds of adjudication were in use before they were in existence, a meaning which it is needless to say I repudiated. The statement itself I still make in the precise terms in which I originally made it, and I maintain that it bears only one meaning.

Coming, then, to the two questions really in issue, the first of them is, What adjudications were in use before 1672? On this point there is evidence placing beyond doubt that adjudications *contra hereditatem jacentem*, and adjudications in implement were in use at that time.

The question whether adjudications *contra hereditatem jacentem* were competent before 1672 in the Sheriff Court, Mr. Mackay now admits, in a footnote to his last letter, to be one "still fairly open to argument." But as he has been brought to admit that there are three (I say four) express decisions of the Court of Session, and the opinions of two eminent lawyers like Kames and Erskine, in support of the competency, and almost nothing against it, I think he might as well have admitted at once that they were competent. Against the authorities in favour of the competency it is useless to set an "implied doubt" (as Mr. Mackay calls it) by Professor Bell, or to urge the fact that many years after the practice had fallen into disuse, it was thought undesirable to revive it. It must be taken as settled beyond all debate that in the seventeenth century adjudications of this kind were competent in the Sheriff Court, and from the references in some of the cases to the "practice" of the Edinburgh Sheriff Court in the matter, it is evident that their use was not at all infrequent.

As to adjudications in implement, there is only the opinion of Erskine in the way of direct authority in support of their former competency in the inferior Court; but there is the substantial ground on which his opinion rests, that if the Sheriff could adjudge in one case, no reason can be assigned why he should be incompetent to exercise the power in other cases in which it was the appropriate remedy. Stair's idea that adjudication was an act done under the *nobile officium* of the Court of Session is adhered to by Mr. Mackay in spite of the fact that the Court of Session itself, on at least three separate occasions, rejected the idea. Mr. Mackay makes no attempt to meet the difficulties which this idea raises. On what principle could a Sheriff Court in any case exercise the power if it was one given by the *nobile officium*? And on what principle could the Sheriff, if he could adjudge land, be limited to the exercise of the power in only one set of circumstances?

The reasons which would make adjudications in implement



competent in the Sheriff Court before 1672 would apply also to any other forms which might be in use before that time, and on this point I have nothing to add. I do not ask every one to come to the same conclusions as I do as to the practice before 1672. Further light may still be got, and it is possible that it may upset the conclusions from what is now known, but I think that in these letters I have at any rate amply vindicated myself from any notion of having made a statement in my work on Practice for which there was no authority.

A statement in my first letter, to the effect that adjudications in security (which, I admitted, were never used in the Sheriff Court) did not come into use until after 1672, having been characterized by Mr. Mackay as "a slip," I adduced, in my second letter, my authorities for it. I also pointed out that the evidence in favour of its earlier introduction consisted of two *obiter dicta* made in the present century. And I concluded by asking Mr. Mackay, if he knew of any other evidence, to be good enough to mention it. In reply Mr. Mackay has again cited the *obiter dicta*; has criticised the evidence I adduced; and has brought one additional bit of evidence into the field. As I hardly know how to deal seriously with an argument that statements made in the nineteenth century are evidence of what happened in the seventeenth, I proceed to the criticism.

Mr. Mackay's criticism is that I have not proved more than that one particular application of the adjudication in security was introduced after 1672. He says that there were many forms of the adjudication in security, and that my proof that Dirleton, who wrote before 1672, knew of no remedy against land for a debt due *in diem*, is proof only that he was ignorant that the remedy could be applied in that particular instance. This criticism reduces Dirleton to the rank of an imbecile, for it is to suppose that he was unable to see that a remedy which would serve for one kind of contingent debt would serve for another. That Steuart, who answers Dirleton, knew that adjudication in security had been used for other kinds of contingent debts, for example, for relief or warrandice, is no proof of the existence of the remedy before 1672. Steuart's book was published in 1715, and as I showed in my former letter, the remedy had come into use and had been used at various times between 1684 and 1711. The new remedy had in fact been used in the very cases which Steuart mentions (see 2 Br. Sup. 72), and it clearly is his knowledge of this fact which enables him to solve Dirleton's doubt. Besides, *Blair's* case in 1711, already cited by me, does not say that one kind of adjudication in security was introduced in imitation or extension of a former kind. As I pointed out in my last, it says that adjudication in security was introduced since 1672, "by custom, *on the analogy of the statute*," passed in that year.

The additional bit of evidence which Mr. Mackay has adduced to show that adjudications in security existed before 1672 is a



form which he has found in the book of styles published by Mr. Dallas in 1697. The book was compiled at various dates between 1666 and 1688, and from internal evidence I make out that Part III, in which the form in question appears, was compiled between 1684 and 1688. From some things about the form I also infer that it was a not particularly old one at that date. But I need not go into details on these matters, because the form happens not to be an example of "adjudication in security" at all, but to be a plain and ordinary example of an "adjudication in implement." The narrative on which it proceeds is that the pursuer purchased from the defender's father certain lands; that the seller died before the pursuer was infeft; that the pursuer had pursued the defender for implement, and had discussed him by "extream diligence" to enter himself heir; and that the lands should now be adjudged to belong to him conform to the disposition. This, stripped of its superfluities, is the summons. In a note to it Mr. Dallas gives two other instances as examples of cases in which it may be useful. The first is where a husband, or a husband's father, has by contract bound himself to infeft a wife in lands in liferent, or in an annuity out of the lands, and has died before infeftment has been taken. Here, he says, it may be used to force the apparent heir to fulfil the contract. The second instance is where lands have been sold by an apparent heir, and he dare not enter because of encumbrances. In this case the lands may be adjudged from him. All these three instances are mere ordinary cases of land being adjudged in implement of a written obligation to infeft, and have not even a semblance to the cases where the pursuer sues for adjudication in security of an illiquid claim for a money debt. What can have misled Mr. Mackay I cannot imagine. To a cursory glance the title of the summons is perhaps confusing. The title describes it as a "summonds of adjudication on extream diligence in matters not liquid, but consisting in deeds prestable." If one read the first clause of this title only, one might suppose that the expression "matters not liquid" included illiquid claims of money. The subsequent clause however shows that it was "deeds prestable" which he meant by the expression, and this is an expression which could never be used with reference to illiquid claims of money.

I have only another word to add. Mr. Mackay concluded his last letter by hoping that you would pardon—apparently for his lengthy contributions—a legal writer who, like himself, was challenged to vindicate not merely his own accuracy but that of one of the masters of the law. That seems to me to be taking a mistaken view of the position. I do not think Mr. Mackay needs to ask pardon for anything, but if he does it is certainly not for defending his own or anybody else's accuracy, but for rashly attacking mine. Mr. Mackay should recollect that I was obliged to write in defence. If he had said in his work that he came to a different conclusion from me upon the authorities, I could have

waited till the third edition of my work before reconsidering the matter. But when he said that I had issued a statement for which there was "no authority," I was bound without unnecessary delay to show what my authorities were. This gave rise to my first letter. I was obliged to write my second letter because he qualified as a "slip" a statement in my first which was a carefully drawn inference from ascertained facts. And I have been obliged to write this letter because Mr. Mackay has, though doubtless in more guarded terms, returned to the charge on both points. If in the course of these letters I have pointed out that the inaccuracies were not mine but Mr. Mackay's, it has only been because it has been impossible for me to defend the right position without showing that the wrong was founded on an insufficient investigation of the facts.—I am, etc.

J. DOVE WILSON.

SHERIFF'S CHAMBERS,  
ABERDEEN, 20th January 1880.

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## Reviews.

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*The Institutes of Gaius and the Rules of Ulpian, with Translation, Notes, and Digest.* By JAMES MUIRHEAD, Professor of Civil Law in the University of Edinburgh. Edinburgh: T. & T. Clark. 1880.

It is not often our happy lot to come across a law-book so workmanlike as this. It is the work of one intimately familiar with his topic, and with the labours of civilians who have elucidated it down to the very latest date; and of one who, while giving due weight to the observations of contemporary masters of the Civil Law in Germany, is bold enough to strike out a reading or an interpretation of his own, whenever he sees need. The motive of the book is explained in a short preface. While acknowledging that two excellent translations of Gaius exist from the hands of Mr. Poste, and of Messrs. Abdy and Walker, the author points out that neither of these incorporates the results of Studemund's revision of the Verona Codex. It seemed absolutely necessary in the interests of exact study that these should be placed in the hands of students of the Roman law as it existed during the period of the Classical Jurists. It may be interesting to recall what may be regarded as the one romance of the Civilians.

These painstaking bookworms, from the glossators downwards, knew that the elementary treatise compiled by Tribonian, and known as the Institutes of Justinian, was founded on, nay, largely copied from, an earlier text-book of one Gaius, probably a provincial, possibly a Bithynian, probably not a lawyer in large practice, but certainly a distinguished teacher of law, who could speak of a senatus-consult passed in the time of Commodus, but of

no enactment of later date. It was shrewdly guessed that were the work of Gaius recovered, it would throw a much-needed light on the history of Roman jurisprudence from the Twelve Tables downwards. It seemed very hard that these learned men should be left to grope about in the deep darkness, which was scarcely relieved by the meagre rushlight, known as the "Epitome Gaii," preserved in Alaric's Breviary. The discovery which was at last to gladden their hearts was just missed near the middle of last century; and it was only in 1816 that a palimpsest was found in the Chapter Library at Verona, which contained at first sight nothing but a copy of the Epistles of St. Jerome, but turned out to have beneath, partly erased, nowhere very legible, and in some places twice written over, a transcript of the lost Gaius. There had been originally 129 leaves written on both sides, with 24 lines or thereabouts on each page, and 39 to 45 letters on each line; but three leaves were entirely lost. Then began a process similar to that which Lachmann undertook and records so graphically in rehabilitating the text of Lucretius. The earlier recensions were marvels of intelligent industry and laborious acuteness; but they were admittedly imperfect. At last in 1866 the Prussian Academy of Sciences commissioned Herr Studemund to undertake another redaction. The result has been the publication of the Apograph, which is the foundation of the present text, followed by a cheap edition for the use of students, edited by Krüger and Studemund, with a critical excursus by Mommsen, and by later editions emanating from E. Huschke and Polenaar.

There can be no question that the result of this last and most careful recension has been to add immensely to our knowledge of the text of Gaius. Whether it be allowed to remain the final revision or not, it was distinctly worthy of the pains which the learned author has expended on the task of making it known to the English student. It is an exceedingly amusing employment for an odd hour to compare Studemund's amended text with, let us say, Huschke's penultimate text as printed in his "Antejustinian Law" (1st edition, 1861). The problem for both compilers was in too many cases the same, namely, from a wellnigh *tabula rasa* dotted over here and there with a few legible and isolated letters to construct a paragraph which should fit in with the context and fit on to the relics. It need scarcely be added that where, as in most cases, no hint of the lost matter could be derived from the Institutes or the Epitome, or the fragments of Gaius contained in the Pandects, the texts so supplied were neither more nor less than "shots." It must be confessed, too, that the guesses have turned out, so far as they have been capable of verification, to be more ingenious than felicitous; for the deciphering of a few letters or words more in the MS. is constantly found to alter the whole drift of the *lacuna*. And the jest comes in, when the whole fabric built up by earlier commentators is found to have

been resting on its apex, and to be amenable to the jog of some weakling Roman capital. Every now and then we come upon a real "find" as the result of this latest and most laborious research. Thus something has at least been made out of what appeared to be the most hopeless desert—that in which there ought to have been the close of the author's account of the interdicts (book iv. sec. 170). The case contemplated at the point where the MS. ceases to be distinct is that of parties who after interdict has been pronounced refuse to take further procedure for the determination of the right. Huschke, in the edition of his "Antejustinian Law" referred to above, fills up the gap with the beautiful picture of two suitable interdicts, one appropriate to moveables, the other to immoveables. The new text, on the other hand, reveals for the first time the existence of an *interdictum secundarium*, and confirms (what was before doubtful) that the very first step in the process after interdict *uti possidetis* was granted, was an act of conventional violence (*vis ex conventu*, see sec. 166) committed by the parties on each other, so as to raise the question which of them had violated the order of the judge. To go no further than the following page, to show the untrustworthiness of the older readings and how they have been superseded by the text used by our author, it is certainly with a feeling of some perplexity that we find that the words "*partim a prætore juris tuendi gratiâ*" in Huschke are correctly read thus, "*pecuniariâ pœnâ, modo juris jurandi religione.*"

There are no such critical difficulties in the Epitome of Ulpian's Rules, which takes up the rest of the volume. The treatise is an admirably lucid and concise statement of the rules of the classical jurisprudence relating chiefly to status and succession.

The general arrangement of the present work is that which is adopted in the treatise of Abdy and Walker above referred to, with one very important addition. At the top of each page is the text with indications of what are doubtful readings or glosses. Beneath is an able translation couched in idiomatic English, concerning which it may be said, that while exception might be taken to such words as "peregrin," "peregrinity," "farreate," and the like, the line is drawn very judiciously between those technical expressions which will bear an English dress and those which are best left in their original shape. At the foot of each page are critical and explanatory notes, containing numerous references to a formidable array of authorities which succeeds the preface. The addition referred to is called a Digest, and is neither more nor less than a very complete treatise on the classical jurisprudence, under headings arranged in alphabetical order, and with special reference to the text of the work. The framing of such a compendium must have been a task involving much irksome labour. The result is, so far as we are aware, unique. It will be invaluable to the student of the Civil Law, and the only doubt we have as to its ultimate utility is whether it may not lend itself too easily and efficiently to the arts of the crammer.

We hope the author may be persuaded to fulfil speedily what is, we observe, his intention, to issue a companion volume on the same lines, containing the Institutes of Justinian.

*Observations on the Law and Practice in regard to Municipal Elections, and the Conduct of the Business of Town Councils and Commissioners of Police in Scotland.* By JAMES DAVID MARWICK, LL.D., Town-Clerk of Glasgow. Edinburgh and London : W. Blackwood & Sons. 1879.

CONSIDERING the importance from an early date of some of the royal and other burghs of Scotland, and the great part they have acted in the history of Scotland and in the development of its trade and commerce, it is surprising that no treatise has hitherto existed to guide the administrators of these burghs in the conduct of municipal business. This gap in Scottish legal literature has now been filled up by the able and learned town-clerk of Glasgow. His experience in that office, both in Edinburgh and Glasgow, has been so extensive and varied that no one can be imagined better fitted for the task he has undertaken.

Though the title of the work leads to the supposition that the conduct of municipal elections will be chiefly dealt with by the author, the work extends far beyond that limited scope. The author is naturally led to deal with the constitution and course of legislation in regard to all the various kinds of burghs—Royal, Parliamentary, of Barony, and Police. The Royal burghs, embracing the most important towns, had their ancient sets superseded by the Municipal Reform Act, 3 and 4 Will. IV. c. 76, which declared the municipal electors to be the same as those who are entitled to vote for a representative in Parliament, and regulates the election of councillors and of the provost and magistrates. Similar regulations were made for Parliamentary burghs and towns by the Act immediately following that above quoted, while the elaborate Police Acts of 1850 and 1862 regulate the proceedings of those numerous and important communities which have risen into existence in consequence of the commercial and mining activity of recent years. The distinctions between the laws regulating elections in all the various burghs are clearly brought out in this work, and the most minute and careful consideration is given to every question under the statutes which can possibly arise in the course of an election. This treatise will prove invaluable, and save an enormous amount of trouble to all engaged in municipal elections—town-clerks, councillors, magistrates, and indeed all lawyers who wish to know something of municipal life and government. The book is enriched with verbatim quotations of the opinions of eminent lawyers on debatable and doubtful questions under the statutes which have not been decided by the Courts. In this way the practitioner has on these difficult points of the statutes the views and opinions of such lawyers as the elder Lords



Moncreiff, Rutherford, Colonsay, Young, Rutherford Clark, Gifford, down to the present eminent leaders of the bar, Lord Advocate Watson and Mr. J. B. Balfour. The industry with which these opinions have been collected, even from the most distant burghs in Scotland, is a remarkable characteristic of the work under review. But we venture to predict that it will become necessary and be well known to all Sheriffs and other returning and presiding officers who have occasion to put the Ballot Act into operation. Nowhere else will be found so complete and clear a statement of the procedure under that enactment, and of the decisions following upon it. The author's summing up of the deviations from the prescribed forms for marking votes which are material or otherwise, and which do or do not lead to the identification of the voter, is a model of clear and distinct deduction from the decisions, and, we are glad to observe, have been quoted with commendation by Mr. Badenach Nicolson in his last edition of the "Law of Parliamentary Elections."

In the latter part of the book the author deals with what he calls the miscellaneous rights, duties, and liabilities of magistrates, councillors, and commissioners of police. Here we have a great amount of interesting information on various subjects which can be found in no other law-book in Scotland. The duties of providing prisons, etc., of exercising jurisdiction and of levying the king's revenue, the sources and control of the revenues and common good of the town, are traced from their earliest beginnings and brought down to the present time. In treating of the legal and other expenses incurred by a town council in litigation or Parliamentary procedure the information given is very full and exact, and the author refers to many English decisions, and to that able work, "Brice on the Doctrine of *Ultra Vires*," showing his desire to give the practitioner the fullest knowledge on the subject, while his chapter on the conduct of business in public meetings is unique at least in Scotland.

In conclusion the author modestly disclaims for his book the title of a legal treatise, and puts it forth as a series of practical observations; but it will be found for a large class of the professional community in Scotland one of the most useful which has been published of recent years.

*Breach of Promise; Its History and Social Considerations.* By CHARLES I. MACCOLLA. London: Pickering & Co. 1879.

It is not the violation of contracts in general that Mr. MacColla deals with in his amusing *brochure*: it is, as might be expected, Breach of Promise of Marriage. We are first treated to its history, condensed into sixteen pages, beginning with the case of *Palmer v. Wilder*, which was tried in Queen Elizabeth's time, down to the famous action of *Bardell v. Pickwick*, which is cited as an illustration



of the state of the law prior to 1869, neither plaintiff nor defendant being allowed to be called as witnesses. The law on the subject is, however, more fully treated in the second chapter, and a considerable number of interesting cases are quoted. The social considerations on both sides of the question are next discussed, and the last twenty-five pages are devoted to reports in a light and rollicking style of various cases relating to breach of promise of marriage. Some curious information may be gleaned from the pages of this little book, and its humour, though sometimes a little forced, is bright and cheery. It is prettily got up, and is just the sort of book to spend half an hour over, with the evening pipe, before going to bed.

*Unclaimed Money. A Handy Book for Heirs at Law and Next of Kin.* By EDWARD PRESTON.

THIS is the third thousand of a book which must have been found useful. Probably comparatively few people know what an amount of unclaimed money there is lying about the world. There is nearly a million in the Bank of England in the shape of unclaimed dividends; and there are many thousands of pounds' worth of South Sea stock in the same condition. Truth is indeed stranger than fiction in many cases, and not the least so in the matter of unclaimed money. Mr. Preston's volume is full of all sorts of curious anecdotes and illustrations of the unexpected and extraordinary, in the way of "windfalls," treasure trove, remarkable legacies and legatees, and a hundred other subjects connected with the magic name of money. Anybody on the look-out for a fortune (and who is not?) could not do better than buy a copy of Mr. Preston's red book.

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### Obituary.

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ADAM TURNBULL, Esq., Solicitor.—The above gentleman died suddenly on the 15th January at his residence near Jedburgh. He was one of the best known local practitioners in Roxburghshire, and was universally respected by all with whom he came in contact.

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### The Month.

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*Day Trespass Act* (2 and 3 Will. IV. c. 68)—*Continuous course of poaching—Costs of conviction.*—Among our reports of Sheriff Court cases there is a report of a case under the Day Trespass Act from the Sheriff Court of Aberdeen, one or two points in which deserve a passing comment. Two men were charged with

trespassing by entering or being upon certain lands in pursuit of game. They had previously been tried and convicted for a similar offence committed on an immediately adjoining estate on the same day. The traditional nigger explained that it was the "same drunk," and the Aberdeen poachers pleaded it was the "same poach." From the report of the case it would seem that to escape the gamekeepers the men had crossed from the estate on which they had been poaching on to the contiguous estate, for trespassing on which they were tried on the first occasion, and that they were apprehended immediately after passing the march dyke. On the occasion which formed the subject of the first charge it would appear that the men had not been in pursuit of game or anything else, but that on the contrary the gamekeepers had been in pursuit of them. However, they were convicted, and the judge at the second trial had nothing to do with whether the first conviction was right or wrong. But the question which the Sheriff-Substitute had to determine was whether he could convict the men a second time for what, supposing they had been in pursuit of game on the occasion first libelled, might "reasonably be called the same act." It was the same occasion. It was a continuous course of poaching. The Sheriff-Substitute remarked that it was an axiom of the law that no man could be tried twice for the same offence, and that if the men were being tried under the common law he should certainly hold a second conviction incompetent. But he held that under the statute the proceedings taken were "quite competent, and that a conviction must again follow." The words of the statute applicable to the offence in question are these: "That if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game, . . . he shall be liable," etc. Now it may be said that the object of the statute was to prevent poaching, and that the *gravamen* of the charge is the being in pursuit of game; and consequently, if there is substantially only one pursuit of game, there is really only one offence. And it may be urged that if a poacher happens to overstep the boundary between two properties, a boundary perhaps unmarked and to him unknown, it is hard that he should be held guilty of two separate offences. Certainly if any proprietor of land is anxious to have the Game Laws abolished, he could not take a more judicious means of attaining his object than by acting on the strict letter of the law and multiplying prosecutions for what is really and substantially one offence. What a judge, however, has to consider is, what is the offence created by the statute as expressed in the words of the statute. We agree with the view which the Sheriff appears to have arrived at with some reluctance. If a man commits a trespass by being upon the land of A without the leave of A in search or pursuit of game, he is guilty of an offence; and if he commits a trespass by entering or being upon the land of B without the leave of B in

search or pursuit of game, he is guilty of another offence. We should not say that if a man was to trespass on different portions of land, say on two separate farms belonging to the same proprietor, he was guilty of two separate offences. It is the same "land;" for the "land" meant by the statute is the "land" of the proprietor without whose leave it is entered. No doubt it may be said that the right of prosecution is given to the *occupier* of the "land" trespassed upon, and that each occupier has a right to protect himself against trespass in pursuit of game. But concurrent rights of prosecution do not affect the question of the number of offences committed. This indeed is shown in this very statute, for the right of prosecution is conferred upon the procurator-fiscal as well as the owner or occupier. And if it be said that the poacher commits two separate offences by trespassing upon two separate farms belonging to the same proprietor, because one farm is "land" as well as the other, it would follow that at every step the poacher takes he commits a separate offence, for one foot of land is as much land as any other foot of land.

This construction of the statute suggests many curious results. If a man trespasses in the course of a sporting ramble over the "land" of half-a-dozen "bounet lairds," whose possessions are mere "kail-yairdies," he commits half-a-dozen separate offences; if he trespasses upon the "land" of a nobleman who owns half a shire, he may take his day's shooting at the expense of one conviction. Consequently we would suggest to any gentleman about to join the poaching profession to select a good big laird when he is at it.

Another question which may be raised is this. Suppose a poacher in pursuit of game on arriving at a march dyke seats himself striddle-straddle across the dyke and takes a shot at a "merry brown hare" on the land upon which he has not set foot, does he commit two offences? By putting his leg over the dyke it may be said that he has committed a trespass. In *Ellis v. Loftus Iron Co.* (44 L. J. Rep. C. P. 24) it was held that the owner of a horse was liable in damages to the owner of another horse, horse No. 1 having stuck its leg through a wire fence and kicked, and thereby injured, horse No. 2. Horse No. 1 committed a trespass, and its owner was liable for the injury committed by his trespassing horse. A trespass of the kind mentioned is different from the constructive entry referred to in *Reg. v. Pratt* (L. J. Rep. M. C. 113), where it seems to have been thought that sending a dog into a field, or firing a shot so that the shot strikes the soil of the field, while the party remains outside, would not be an offence within the statute.

Another question raised in the same case was as to the amount of expenses to be awarded to the prosecutor. "Costs of conviction," not "expenses of process," says the Sheriff-Substitute, is the expression used in the first portion of the first section of the Act, the portion of the section applicable to the case before him. "Costs of conviction," he says, means something different from

“expenses of process.” “Costs of conviction,” he says, is an expression borrowed from the English Acts; and these “costs” consist in England, to the best of his belief, mainly of the dues that are paid to the Clerk of Court, amounting to a very few shillings; not the whole expenses incident to procuring a conviction. It never was intended, he adds, that a professional law agent should appear in this class of cases; the intention being that the gamekeeper, or some other servant of the proprietor, if not the proprietor himself, should present the complaint and lead evidence. Consequently, in the absence of authority, the Sheriff-Substitute would have held it never was intended that the prosecutor should recover the expenses of process; and further, that to deal with these as regulated by the table of expenses provided for civil process would be absurd. But then, he concludes, there is a case in 1859 in the High Court of Justiciary (*Porter v. Stewart*, Dec. 5, 1859, 3 Irv. 499) in which it was held that the practice of allowing expenses of process according to the scale in the Act of Sederunt, relative to the fees in Sheriff Courts, is a proper and commendable practice.

There are here a number of statements which it is necessary to examine in detail. (1) “Costs of conviction,” not “expenses of process,” is the expression used in the Act. Let us look into the Act. In the first portion of the 1st section of the Scottish Day Trespass Act, in specifying the penalty of one offence, the expression “costs of conviction” is used. In the second portion of the section specifying the penalty for another offence, the expression “expenses of process” is used. Taking this first section alone one would say that, two different expressions being used, “costs of conviction,” whatever it means, means something different from “expenses of process.” But in the 9th section, giving a form of conviction for all cases falling under the statute, the expression “expenses of process” is used; showing clearly that the two expressions, whatever they meant, were meant to be synonymous; and further, that the expression “expenses of process” was meant to be the ruling one, for any one who has to put a conviction into execution must look to what is said in the conviction and to nothing else. The truth of the matter is that “costs of conviction” is not originally a Scottish law term. It occurs in the English Act, 1 and 2 Will. IV. c. 32, upon which the Scottish Day Trespass Act was modelled; and the draftsman of the Scottish Act while altering the English expression in one half of the section, forgot to draw his pen through it in the other half, and substitute for it the Scottish expression. (2) Costs of conviction, “to the best of my belief,” consist in England of the dues paid to the Clerks of Court, and amount to a very few shillings. Now, if the English practice is to guide us at all, one should *know* what it is, not merely have a belief about it. (3) It does not in the least matter what construction is put in England on words occurring in an English statute; and it does not in the least matter where the words occurring in a Scottish

statute have been borrowed from; from the law of England or the laws of the Medes and Persians, from the law of Denmark or the judgments of Damme. Occurring in a Scottish statute, they must be construed according to Scottish lights and Scottish law. The words are to be understood in the meaning which they bear in the country for which, and the time at which, the statute is passed. In the case of *Sandys v. Lowden and Rowe* (Nov. 9, 1874, 4 Rettie (Justiciary), 6) it was vainly argued that the words "house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts" occurring in the Debts Recovery Act were borrowed from the Triennial Prescription Act of 1579, and that consequently the expression "merchants' accounts" must receive the same limitation in construing the former Act as it had received in construing the latter. The Court in effect said, We have nothing to do with the interpretation put upon these words occurring in another Act passed for a different purpose and at a different time. If words occurring in one Scottish statute do not carry with them, as a sort of pendicle, the meaning there attributed to them into another statute, still less can words occurring in an English statute carry with them the meaning attached to them in England into a Scottish statute.

(4) It was intended, says the Sheriff-Substitute, that a gamekeeper or some person of that description should prosecute. Where does the learned Sheriff-Substitute gather that intention? The Act, which is the only legitimate source of discovering the intention of the Legislature, gives no inkling of such an intention. If it did, we think it would have intended something very foolish. Questions of difficulty occur in the construction of the Act, and the present case, according to the Sheriff-Substitute's own showing, is one of these. When questions of difficulty occur, the judge is always willing to have the assistance of the professional gentlemen practising before him, and often is so assisted. What help could a gamekeeper give in construing an Act of Parliament? Of what use would he be in the preparation of a special case? (5) If the Sheriff-Substitute were to interpret the Act for the first time and without the light of authority, he would, he says, come to a certain determination. He immediately adds that he is *not* interpreting the Act for the first time and without the light of authority, but that, on the contrary, there is a decision on the point pronounced by the High Court of Justiciary in 1859. If there is a decision on the point by the Supreme Court twenty years ago, it occurs to one to ask, what is the use of arguing any further about the matter? Something in this world must be considered as settled, otherwise we shall never get along. If the decision pronounced some twenty years ago upon the construction of an Act of Parliament by the tribunal of ultimate authority in such matters leads to an oppressive result, the only remedy is an appeal to the Legislature. Certainly there is none to the Sheriff-Substitute. We have observed a little inclina-



tion in some quarters to reverse the relations between the Supreme Court and the Sheriff-Substitute, and to turn the Sheriff Court, not indeed into a tribunal of review, but into a lecture-hall of review of the decisions of the Court of Session and the Court of Justiciary. In one case which has attracted some attention there was this to be said in palliation of the particular indulgence in a practice which is utterly anomalous—that the review was confined to the decisions of the past year, and was addressed to an audience of procurators. When the review goes back twenty years, and is addressed to a pair of poachers, we think this is going a little too far. We need not wonder that Sheriff-Substitutes complain of being overburdened with work, when we find them undertaking tasks which it is not only not incumbent upon them to undertake, but which it is incumbent upon them to avoid undertaking. And it is rather hard upon the poachers. The poor fellows want to know “what they are going to get,” and have done with it. The Act of Parliament empowers the judge to inflict upon them the penalty of a fine; but it does not empower him to inflict upon them a discourse, the gist of which is that the Sheriff-Substitute of Aberdeenshire and the High Court of Justiciary differ in opinion. Macaulay tells a story of an Italian prisoner who had the option presented to him of reading through Guicciardini's History or going to the galleys. The Aberdeen poachers are not so fortunate as to have such an alternative set before them. They get the galleys, and Guicciardini too.

The Sheriff-Substitute further considered the question whether he had right to modify the expenses; he held that he could do so, but that he could not make the sum elusory. If he cannot make the expenses elusory, can he make the fine elusory? and surely a fine of a shilling or half-a-crown is an elusory one. As to this matter, we do not think it necessary to consider whether the judge who tries the case has power to *modify* the amount of expenses. He has right to *determine* the amount.

*Civil Servants and Co-operative Stores.*—Referring to the investigation which is at present being made as to the connection of civil servants with trading associations, Mr. Ludlow, the Chief Registrar of Friendly and Co-operative Societies, makes the following remarks in his last-issued report. They are extremely suggestive and put the matter in an entirely new light, one which has not sufficiently been attended to:—

“During the present session a select committee of the House of Commons has been sitting substantially to investigate the complaints of tradesmen on the subject of what is termed ‘Civil Service Trading.’ The evidence has not yet been officially published, and only one of the societies complained of, ‘The Civil Service Supply Association Limited,’ is registered at this office. It would, therefore, be premature, if not unnecessary, to offer any comments here



on the matter. The Chief Registrar would, however, venture to point out that the object of the promoters of the committee appears to be, in the terms of the Trade-Union Act Amendment Act, 1876, to impose 'restrictive conditions on the conduct of a trade or business' by debarring certain of her Majesty's subjects from engaging therein; that those promoters thus constitute a trade-union (which may be a combination, either 'temporary or permanent,' within the definition of the Act), and that the investigation referred to is consequently one as to whether the objects of a trade-union should be enforced by law. Having reference to the current views of political economy, the fact that a trade combination should have been sufficiently powerful to obtain an investigation by a select committee of the House of Commons for such a purpose is both singular and noteworthy."

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## The Scottish Law Magazine and Sheriff Court Reporter.

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### SHERIFF COURT OF ABERDEENSHIRE.

Sheriff COMRIE THOMSON.

GORDON v. MORRISON AND RITCHIE.—Dec. 1879.

*Day Trespass Act* (2 and 3 Will. IV. c. 68)—*Continuous course of trespassing in pursuit of game—Tholing an assize.*—Held that where a man trespasses in pursuit of game on adjacent "lands" belonging to different proprietors during the same course of poaching, he is liable in a separate penalty for his trespass on each of such "lands."

*Day Trespass Act*—"Expenses of process."—Observations on the meaning of this expression in the Act, and on the case of *Porter v. Stewart* (3 Irv. 499).

Two men, named William Morrison, *alias* Alexander Skinner, and George Ritchie, *alias* George Thomson, were charged at the instance of Henry Wolrige Gordon, Esquire of Esslemont, with trespassing in pursuit of game, on 19th Nov., on the farm of Cross-stone, belonging to the prosecutor. Both the men pleaded guilty, Morrison stating that he thought they were being tried for the same offence as that for which they received sentence on Saturday. In reference to this statement it was explained to the Sheriff that the accused had been before his colleague, Sheriff Wilson, on the previous Saturday on a charge of poaching on the Turnerhall estate (which immediately adjoins that of Mr. Gordon of Esslemont), that they had then received sentence, and that they were now brought up on a charge of trespassing on the estate of Mr. Gordon, from which estate they had passed on to that of Turnerhall. Morrison also stated as supplementary to the explanation just given, that he and Ritchie had just got the length of the march dyke between the properties when the keepers took them, and there had been some dispute as to whose lands they were on.

At the Sheriff's suggestion, a plea of not guilty was then tendered, and the evidence of a gamekeeper on the Esslemont estate was heard. He stated that he first observed the men on the farm of Cross-stone, beating a field, and each carrying a gun and game-bag. After remaining for some time on the field mentioned, they proceeded towards the Turnerhall estate, and at the march dyke they had been apprehended, when it was found that Ritchie had in his bag three hares and two partridges and Morrison one hare and one partridge.

For the prosecution it was contended that the accused were poaching on Essle-

mont previous to poaching on Tippetty, on the Turnerhall estate. The place where the two men were poaching was a point where the three estates of Ellon, Esslemont, and Turnerhall met, and there was reason to believe that the poachers looked upon it as a rather convenient spot, because of the ease with which they could slip from one property to another. If they saw a keeper on Turnerhall, they could make for Ellon, and so on. On this occasion, however, the poachers had quite overreached themselves, and it was submitted that a conviction must follow, because it was quite clear that the game was killed on the farm of Cross-stone, or, at any rate, not upon Tippetty.

For the defence it was contended that this being a continuous act, and the men having already been punished for it, they were not liable to conviction a second time.

The Sheriff said : " There is no doubt that on the occasion in question you two men were guilty of trespass in pursuit of game, and I regard your conduct as somewhat aggravated, because you were men residing in Aberdeen deliberately going eighteen miles out of town, armed with a gun, and having a game-bag, for the express purpose of doing what you knew to be a contravention of the Act of Parliament and a defiance of the law. On the merits of the case there is no excuse whatever for you, but your position is in this respect peculiar, that on Saturday last you were tried here and convicted for your conduct on the same occasion as that which is made the subject of your trial to-day. Of course it is an axiom of the law, that no man can be tried twice for the same offence, but the peculiarity here is, that you were continuing a course of poaching, in which you passed from one field into another, and from one estate into another. The proprietor of the estate in which you were ultimately caught took proceedings against you on Saturday; the proprietor of the estate from which you passed, and on which also you were in pursuit of game, takes proceedings against you to-day. On Saturday you were each mulcted in a fine of £3, including expenses, and I am now asked to-day to impose upon you another penalty, for what may reasonably be called the same act. Although, if you were being tried under the common law, I should certainly hold that your conviction to-day was incompetent, yet under the statute it seems to me that the proceedings that have been taken are quite competent, and that a conviction must again follow. At the same time, it is my duty to take into consideration, by way of mitigation of penalty, the fact that you have already suffered the pains of the law for your conduct on the day libelled. Another question, and one of much wider interest and importance, has been raised, and, I understand, was raised also when you last stood at the bar, viz. as to the amount of expenses which a prosecutor under the game laws who succeeds in obtaining a conviction is entitled to recover; and that is a question which is attended with considerable difficulty. The words of the Act of Parliament are that what a prosecutor is to recover when there is a conviction under this portion of the section of the statute is, not the *expenses of process* at all; it is what is called the 'costs of conviction.' Now, these are words which are not familiar to the Scottish law; they are borrowed evidently from the English Acts; and are used in our Scottish Act apparently by a sort of accident. 'Costs of conviction' in England mean a different thing from expenses of process. They consist, to the best of my belief, mainly of the dues that are paid to the Clerks of Court, and amount to a very few shillings; and if I were here to interpret the statute for the first time, and without the light of authority, I should certainly hold that it never was intended that a prosecutor should recover from those convicted of day poaching the expenses of process; and I should hold further, that to deal with these expenses as regulated by the table of expenses provided for cases of civil process would be absurd. It never was intended that a professional law agent should appear in such cases as this; the intention was that the gamekeeper or some other servant of the proprietor's, if not the proprietor himself, should present his complaint and lead evidence, the whole expenses to be incurred being the dues of Court. But I am not at liberty to follow that which I believe to be the true construction of the Act of Parliament, and the true intention of the

**Legislature.** It is the way in which matters are managed in England, but it is not the way in which matters have hitherto been managed in Scotland, and I have before me a decision of the High Court of Justiciary, pronounced in 1859, in which their Lordships held that the practice of allowing expenses of process, according to the scale in the Act of Sederunt, relative to the fees in Sheriff Courts, was a proper and commendable practice. It was there urged, as it has been urged here, that to do such a thing was to punish the poacher by the award of expenses, which might be ten times as large as the maximum amount of the penalty which the statute allows. No more than £2 of penalty can be imposed here, and if it were a civil debt no more than 3s. 1d. would require to be expended. But it is not a civil debt: it is a penalty for poaching, and therefore £20 of expenses—any amount of expenses—might possibly be incurred, and might be imposed upon a poacher provided only he is convicted. I had occasion the other day to do what I daresay seemed to many persons an anomalous thing—to impose a penalty, a nominal penalty of 1s.; but I felt myself driven at the same time to impose expenses amounting, if I remember rightly, to upwards of £5. I did it against my own belief in what is right; but I feel bound to follow the authority of a decision of the High Court of Justiciary. At the same time I cannot agree with the view that has been suggested by Mr. Garden, that the Court is bound in every case to impose the full amount of expenses, because there is inherent in every Court, by the common law, power of modifying the expenses, as the circumstances of the case may seem to demand. It would, however, be quite wrong to exercise that power to such an extent as to make the modification illusory, and I think one is bound to give substantial expenses. In looking to the whole circumstances of the case as I have just adverted to them, my award is that each of the accused shall pay 2s. 6d. of penalty, and each of them £1 of expenses, with the alternative of seven days' imprisonment—seven days being allowed in which to pay."

*Act.—Garden.—Alt.—Wight.*

## SHERIFF COURT OF ELGIN.

Sheriff SMITH.

December 5, 1879.

*Game Trespass Act*—"Without the leave of the proprietor"—*Son of a tenant farmer held liable for trespass on his father's farm.*—In this case Alexander James, son of, and residing with, John James, farmer, Brokentore, and miller at Mills of Kellas, was charged with trespassing on his father's farm without leave of the proprietor, in pursuit of game, and unlawfully shooting at and destroying one or more grouse. At the first diet the agent for the respondent raised an objection to the relevancy of the libel that it was not competent to charge a farmer's son with trespassing on his father's farm. He also produced a document from the proprietor of the farm granting permission to the "farmer or any member of his family" to shoot hares or rabbits on the farm.

In giving judgment, the Sheriff read the following note:—

"*Note.*—In the Game Trespass Act, 2 and 3 Will. IV. c. 68, it is enacted, 'That if any person shall commit any trespass by entering, or being in the daytime upon any land, without leave of the proprietor, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, such person shall, on being convicted, forfeit and pay a sum not exceeding two pounds, together with the costs of the conviction.' The respondent is charged under this Act with having trespassed in search of game other than hares and rabbits, and it is proved that on the occasion charged he shot at and killed a grouse on the land mentioned in the complaint belonging to the complainer, but it is proved, on the part of the respondent, and admitted on the part of the complainer, that the land in question is part of a farm of which the

respondent's father is tenant, and that the respondent resides in family with his father, and assists him in its management and working.

"It is contended on the part of the respondent that in such circumstances there can be no relevant charge against him under the Act founded on. He adduces in support of this contention the cases of *Smellie v. Lockhart* (1st June 1844, 2 Brown, p. 194), and of the *Earl of Kinnoul v. Tod* (15th December 1859, 3 Irvine, p. 501), in both of which it was held that a tenant could not be convicted under the Act in question of trespassing in search of game on the land of which he was tenant.

"On the other hand, the complainer founds on the terms in which the offence is defined in the Act, and on the decisions in the cases of the *Earl of Selkirk v. Kennedy* (14th December 1850, John Shaw's Reports, p. 453), and of *Reaper v. Duff* (6th February 1860, 3 Irvine, p. 529), in both of which it was held that farm servants might be competently convicted for trespassing in search of game on the land on which they were in service. He also founds on the case of *Black v. Bradshaw* (16th December 1875, 3 Cowper, p. 209), in which the tenant of the farm was a female, and in which her brother, who resided with her, and assisted her in the management, was held liable to be competently convicted in the same way.

"These decisions are undoubtedly conflicting. The Lord Justice-Clerk (Lord Moncreiff), who presided in the case of *Black v. Bradshaw*, expressly stated that it was not easy to draw any logical distinction as regards the construction of the Act between the position of a tenant who was held to be excluded and that of a farm servant who was held to be included within its provisions.

"In regard to a new point, therefore, such as has arisen in the present case, which is not expressly ruled by any of the decisions which have been quoted, I can find nothing which relieves me from the necessity of dealing with it as an open question, in regard to which I must be guided by the best interpretation I may be able to apply to the terms of the Act itself.

"It is defined to be a trespass or offence against the Act for any person to enter or to be upon any land without leave of the proprietor in search or pursuit of game. In the first aspect of this sentence the idea is apt to arise that the trespass consists in the first instance in entering or being on the land without the leave of the proprietor, and that unless a person should enter or be on the land without leave of the proprietor, he could not be held to commit what would, in that case, be the second part of the offence. The result of this view is, in many respects, unsatisfactory and inconsistent. It tends to make it an offence, or part of an offence, to enter or be on the land without the leave of the proprietor of the land. Now, in so far as regards this Act of Parliament, it is plain that the mere fact of a person entering or being on the land without the leave of the proprietor, if he do nothing more, is no offence against the Act, and is not punishable by it in any way. In that sense, and to that extent, it is a matter of indifference, as regards this Act, whether the person be there with or without the leave of the proprietor. It is unintelligible, on that footing, why the qualifying words 'without the leave of the proprietor' should be applied to that part of the sentence. If, again, these words are applied to that part of the sentence, it removes them from and renders them inapplicable to the remaining part of the sentence relating to the pursuit of game, and involves the further inconsistency that if, on any pretext whatever, or without any pretext at all, a person get upon the ground with the leave of the proprietor, he may without any further leave pursue and take game at his pleasure.

"The further consideration arises that it never could have been the policy of this department of legislation to exempt any class of persons from the operation of the Act. There could have been no possible reason for limiting its prohibitions exclusively to trespassers from without, and allow persons otherwise on the land to offend with impunity. The fact that some of the executive provisions of the Act apply only to trespassers from without does not affect this view.

Various classes of offenders require to be differently dealt with. The phrase 'entering or being' seems to have been intended expressly to include all classes of trespassers in pursuit of game both from without and from within, and the governing intention of the enactment seems to be to protect the game from all persons taking it without the leave of the proprietor of the land.

"If these views be correct it must be held that the effective application of the words 'without leave of the proprietor' is not to the words which precede them, but to those which follow them, and that the effective meaning of the enactment is directed against all persons who shall enter or be on any land in search or pursuit of game without the leave of the proprietor of the land. The apparent motive of the draftsman of the enactment, in expressing it as he has done, was probably not to separate the word 'proprietor' too far from the word 'land,' to which it relates, and to save the repetition of the latter word; but the meaning is the same, as there can be no reasonable question that the sting of the offence was intended to consist in the fact of being in the pursuit of game without the leave of the proprietor of the land. It would be inaccurate to speak of the proprietor of the game, because, in strict law, game while at large has no proprietor.

"I do not see any inconsistency in the views which have now been taken. I am aware that some of these views are at variance with some opinions which have been expressed by higher authority, and I desire to have the utmost respect and deference for such authority, but they are in accordance with other opinions of equal authority, and I know no other way of dealing with the questions of principle which have been raised in the present case.

"I must, therefore, repel the defences in regard to relevancy, and, as the charge has been proved, I must convict the respondent."

A fine of £1, with £2, 10s. of modified expenses, was then imposed, failing payment within eight days, fourteen days' imprisonment.

*Act.*—Forsyth and Stewart.—*Alt.*—Cruickshank and Burnett.

[This case was appealed to the High Court of Justiciary, and was heard on the 28th Jan. The appeal was dismissed with modified expenses.—*Ed. J. of J.*]

## SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

HENDERSON v. ANDERSON AND OTHERS.

*Process*—*Action against trustee*—*Master and servant*—*Reparation*.—Hayman employed Anderson and Henderson to erect certain buildings, and J. & R. Thorn subcontracted with them to do part of the work. The pursuer's husband was in the employment of Hayman, and was killed by the breakage of a chain. She brought an action for reparation against Anderson and Henderson, and against the trustee on the estates of the Thorns, which had been sequestrated. The Sheriff-Substitute held the action against the trustee incompetent, and found the other defenders liable in damages. Both judgments were acquiesced in. The following are the material parts of the judgments:—

"Finds that the defender Selkirk is not bound to appear as a defender in answer to the pursuer's claim: Sustains his second plea in law: Assoils him from the conclusions of the action, and decerns: Finds the pursuer liable to him in his expenses.

"*Note.*—Mr. Herron gave me a careful argument in support of the competency of his action; and I so far agree with him that I think it would be well if he could induce Mr. Selkirk to agree to let the action go on. But though Mr. Selkirk is entitled to take the burden of litigating in this form, he is not bound to take it. The ratio of this will be found clearly stated in Lord Shand's judgment in the case of *The Phosphate Sewage Co. v. Molleson*, 1 R. 847. See also the opinion of the Lord President. And the cases cited for Mr. Selkirk are clearly in point.



"It was stated that the injury to the pursuer's husband was received a few hours after Messrs. Thorn's estates were sequestrated.

"But can their workmen be said to have been in the employment of the creditors, and of their representative, from the moment the deliverance awarding sequestration was signed? I think that is too fine-spun a contention, and that the law demands a more positive and an actual intervention by the new master or masters before they incur direct liability.

"The workmen would be still in the employment of the Messrs. Thorn, and a not unusual way is to constitute a claim of damages by action against the bankrupts. The bankrupts will in many cases have an interest to defend the case as well as the necessary knowledge.

"The radical right to the estate is with them; and if they are discharged on a composition, and reinvested in their estate, their interest is more real in the matter than their creditors.

"But it will be for Mr. Selkirk to consider whether there is any way of opposing the pursuer's claim without liability for expenses in the event of her success. If she sue the Messrs. Thorn, and he intervene in the case and litigate it, he will be liable in costs. If the pursuer sue him to constitute her claim, and he offer active opposition, he will be liable in expenses (*Smith v. Kippen*, 19th July 1860, 22 D. 1495). If the pursuer claim in the sequestration, and her claim be rejected, and be sustained on appeal, equally will he have to bear the costs of it. And the costs of fighting the case single-handed will be greater than fighting it along with the co-defender. Therefore I think, though his plea must be sustained if insisted in, it will be for him to consider what is the best course for him in the interests of the creditors to take."

Thereafter proof was led, and the Sheriff-Substitute found—"(1) That in the course of last year the defenders entered into a contract with Messrs. Hayman & Son to erect for them certain buildings in Centre Street and King Street; (2) that in May 1878, Messrs. J. & R. Thorn, wrights and builders in Uddingston, subcontracted with the defenders to execute for them part of the above-mentioned contract, consisting of the mason-work, the asphaltting, and the providing and laying of the fireclay pipes, and the pavements and kerbstones; (3) that for the purpose of carrying out their respective undertakings the defenders and the Messrs. Thorn each set up a one-ton crane, but that the workmen of each party were in the habit of using the crane belonging to the other according as suited their convenience; (4) that in the course of the autumn Messrs. Thorn got into difficulties, and on 11th November granted a mandate for the purpose of having sequestration taken out, and that the defenders, when it became apparent that the Messrs. Thorn would be unable to finish their part of the contract, assumed the control of it, and eventually resumed and finished it; (5) that on 25th November 1878, William Henderson, the pursuer's husband, was ordered by Mr. Hayman, his employer, to put up a ticket intimating that the premises were to be let; and that while for this purpose he was ascending the gangway at the outside of the buildings, a stone which was then being raised by the defenders' crane, but by workmen originally engaged by the Messrs. Thorn, fell on him and killed him; (6) that he received no warning that the stone had been swung round above him, and that it is not shown that he was in any way cognizant of the danger that had been brought upon him, or that there was any impropriety or negligence in his being where he was at the time he was killed; (7) that the fall of the stone was due to the chain giving way by which it was suspended, and that the chain gave way through no unfair or incautious usage, but solely from its being unfit for the purpose for which it was being used, and for the purposes for which it was required; (8) that the chain was known to the defenders' foreman and workmen, if not to themselves, to be old, patched, and frail, and to have broken at least twice in the progress of the work; and (9) that on 25th November the carrying on the building operations was under the control of the defenders Anderson and Henderson. Finds in these circumstances as matter of law—(1) That the said defenders, as having the control of the workmen on the job



and being responsible for their acts, are liable in damages to the persons entitled to claim reparation for the death of William Henderson ; and (2) that the pursuer, as his widow, has such a right : Therefore repels the defences, and decerns against the defenders Anderson and Henderson for payment to the pursuer of the sum of two hundred pounds ; and finds her entitled to expenses.

“ J. M. LEES.

“ *Note.*—The defenders tried to show that Henderson was ascending by a gangway which he ought not to have used, but of this I think there is no sufficient proof. Then as regards common employment, that is a plea which can be taken only by the common employer of the injuring and injured party ; and that is not the position of the defenders in this case. The chain which broke was here the only one supplied by the defenders, and it was, it seems to me, unquestionably bad.

“ In this state of matters the pursuer has the same remedies open to her that any member of the public would have who had been injured by the breakage of this chain. Now to escape liability the defenders urge that at the time when the chain broke it was not being used by their workmen. The pursuer in reply maintains that the defenders had taken over the contract from the Messrs. Thorn. I think her contention is sound. But even if it were not, the question would arise, whether the defenders, in providing defective machinery and sanctioning its use by the other workmen of the job for purposes for which it was unfit, would not be responsible for the results ? It is unnecessary to decide the point, but the principles of our law, and the dicta of the Lord Justice-Clerk in *Cowan v. Dalziel* (5 R. 241), seem to me to point to such a result.

“ In my opinion it is distinctly proved that the defenders had undertaken by 25th November the control and supervision of the whole work. By the end of October the Messrs. Thorn were unable to pay their men, and thereafter the men were paid by the defenders. They were known to the defenders to be in a state of insolvency ; and even though the defenders may not have known that they had granted a mandate for sequestration, and that one of the Thorns had absconded, it is plain they knew well that all hope of the Thorns finishing the subcontract was at an end. Now there was no contract between Hayman & Son and the Thorns. The defenders had undertaken the whole contract, and therefore they were bound to Hayman & Son to finish it. Hayman & Son were pressing them to get it completed, and just because of this they were furnishing the money to pay the Messrs. Thorn's men, who had refused to go on with the work unless paid. As matter of fact, on 30th November the defenders did resume the Thorns' part of the contract, and before this they had guaranteed to the merchants who had provided the stores that they would be paid. Whilst the Thorns had the control of the contract they were there, or one or other of them, every day once at least. But latterly neither of them was there ; and it is far-fetched to say that their foreman was left to manage the job. It seems to me, on a careful perusal of the evidence, that there is little room for doubt that before the 25th of November the defenders had undertaken the management of the whole work. If it were not so I do not see how Livingstone could well have proposed to one of the Thorns to come and earn a wage.

“ Now it appears to me to be little matter whether the defenders had in word or in writ extruded the Thorns from the subcontract and definitely resumed it. That may be of importance in any question as to their respective rights between the defenders and the Messrs. Thorn. For the purposes of the safety of the public the question to be asked here is, Who was then having the control of the work and workmen ? for whoever that may have been is the party that must be liable for their acts. I think the defenders are clearly in that position. And I would only further remark that I do not see where the fault of the man at the crane was. If I am to believe the evidence, they were taking the utmost pains to avoid risk. And if their fault lay in using the crane at all, the

defenders' position is only worse. In truth the fault lay in the material and not in the men, and the material was the defenders'.

"As regards the amount to be awarded to the pursuer, that is a jury question. Henderson was a foreman cartwright, twenty-nine years of age, earning 35s a week, and is shown by the testimony of various witnesses to have been a steady and industrious man, and of good attainments for one in his position. The pursuer is twenty-four years of age and has one child, a boy four years old. Her claim is made for herself alone. Judges would probably differ as to what is the proper sum to give her, and indeed perhaps the same judge might think differently at different times. My own opinion has fluctuated between £150 and £250, and I have accordingly given £200. I do not cast upon the defenders the burden of paying their co-defender's expenses, as is generally done in similar circumstances. Mr. Selkirk was made a party to the action when he never should have been; it was an error in pleading, and one for which the present defenders are in no way to blame. J. M. L."

*Act.*—Herron.—*Alt.*—Anderson.

## Notes of English, American, and Colonial Cases.

**MORTGAGE TO A BENEFIT BUILDING SOCIETY.**—*Rule of society that all disputes should be referred to arbitration.*—The plaintiff, a member of a benefit building society, incorporated under and still subject to the Act 6 and 7 Will. IV. c. 32, mortgaged certain property to the society. The provisions of 10 Geo. IV. c. 56, are, so far as applicable, incorporated with 6 and 7 Will. IV. c. 32. One of the rules of the society provided that all disputes between the society and any of its members should be referred to arbitration, pursuant to 10 Geo. IV. c. 56, sec. 27. The plaintiff brought an action as mortgager against the trustees of the society for an account. The defendants contended that the proper remedy was arbitration under the rules:—*Held*, that the provisions of 10 Geo. IV. c. 56, sec. 27, are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage, and that the jurisdiction of the Courts was therefore not ousted.—*Mulkern v. Lord* (H. L.), 48 L. J. Rep., Chanc. 745.

**CLUB.**—*Expulsion of member—Misconduct—Duties of committee—Injunction.*—Where the committee of a club have according to their rules a power of expelling a member from the club, such committee, being a quasi-judicial tribunal, are bound to act in accordance with the ordinary principles of justice, and before adjudicating upon the conduct of any member, are bound to give him notice of their intention to proceed against him, and afford him an opportunity of justifying or palliating his conduct; and if the committee pass a resolution expelling such member, without previous notice to him, such resolution being based upon *ex parte* evidence, the Court will declare such resolution to be void, and will restrain the committee from interfering with his rights and privileges as a member of the club.—*Fisher v. Keane*, 49 L. J. Rep., Chanc. 1.

**LOAN SOCIETY.**—*Unregistered—Winding up—Number of members—Less than seven—Partnership—Dissolution—Loan Societies' Act—Companies' Act.*—Where the number of members of an unregistered loan society, formed under 3 and 4 Vict. c. 110, had at the date of a creditor's petition to wind up the society fallen below seven, although the number of members had formerly exceeded that number:—*Held*, that by virtue of sections 199 and 200 of the Companies' Act, 1862, no winding up order could be made, but that to enable the Court to wind up the affairs of the society it was necessary to commence an action for the dissolution of the partnership subsisting amongst the present members.—*In re the Bolton Benefit Loan Society. Coop v. Booth*, 49 L. J. Rep., Chanc. 39.

# THE JOURNAL OF JURISPRUDENCE.

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## CONDUCTIO INDEBITI.

THE action to which the name of *condictio indebiti* was applied in Roman law is based on principles which afford scope for interesting analysis. When I pay or deliver anything to another in a mistaken belief that I owe it to him, common sense would seem to indicate that I have a right to get it back. Any rule of law which would wholly exclude all claim for repayment or redelivery in such case would be looked on as contrary to natural equity. Accordingly we find in every enlightened system of jurisprudence it is provided that what has been paid in error and without obligation may be recovered.

In the Roman law there were a number of well-known actions for the purpose of enforcing restitution of whatever was obtained by any one without just *causa* or consideration. Such were the conditions: *Sine causa—ob causam datorum—ob turpem vel injustam causam*—and *indebiti*. Of the latter of these actions, Papinian (Dig. xii. 6, 66) says that “*ex bono et æquo introducta quod alterius apud alterum sine causa deprehenditur, revocare consuevit;*” indicating thereby that it might be brought for repetition of whatever had been paid beyond what was due. The whole basis, accordingly, of the *condictio indebiti* in Roman law was a payment not due and made in error.

Following the Roman law, the doctrine is stated thus by our text-writers. “*Indebiti solutio*,” says Erskine (Inst. iii. 3, 54), “or the payment to one of a debt not truly due to him, is in effect a *pro-mutuum* or *quasi mutuum* by which he who made the payment is entitled to an action against the receiver for repayment; which arises not from any explicit consent or agreement of parties, but solely from equity.” And Professor Bell, who, like Stair,<sup>1</sup> treats it as a branch of the general doctrine of restitution, says (Principles, sec. 531), “Whatever has been delivered or paid on an erroneous conception of a duty or obligation may be recovered on the ground of equity, providing the person receiving it has no

<sup>1</sup> Cf. Stair, i. 7, 9.

reason on natural right, implied donation, or compromise to rely on the acquisition as his own." In English text-books and decisions the doctrine is stated to a similar effect; action for money *had and received* being the technical expression in English law for the *condictio indebiti*. Mr. Addison in his work on Contracts (p. 1060) states the rule very conveniently: "If a man through some mistake or misapprehension or forgetfulness of facts has received money to which he is not justly and legally entitled, and which he ought not, *in foro conscientiae*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner."

Now, taking the above definitions, it will be observed that two conditions are required in order to give right to the *condictio indebiti*: first, absence of knowledge on the part of the person who makes payment that no debt is due; and, second, no right legal or natural on the part of the payee to retain.

With regard to the first of these conditions, it is obvious that if there be knowledge that no debt is due, the payment must be treated as a donation, and there is no room for the action. But if the payment be made in ignorance, the question arises, Is the error one of fact or one of law? Between these two—error as to fact and error as to law—there is a well-known and very material distinction, and one which has been the subject of much learned controversy in various branches of the law. In the first place, with regard to error in matters of fact, it may be stated as a general rule that restitution of the *indebitum* will be granted. This is the invariable rule in cases of mutual contract, for a contract which has been induced through error in fact will either not be enforced, or if executed, will be set aside. The only requisite is that the error shall be in an essential of the contract. One of the most recent illustrations of this is the case of *Gilmour and Others (Stewart's Trustees) v. Hart* (22nd December 1875, 3 R. 192). In this case A entered into a contract of sale of property to B under burden, as A understood, of a feu-duty of £9, 15s. The disposition omitted mention of the burden, and on proof it was found that in granting it A laboured under error of which error B was aware; A was held entitled to *restitutio in integrum*. And though a formal disposition had been granted by A embodying the terms of the agreement, it was held to be vitiated by the essential error as to the price. Now although in this case there was present the element of knowledge by one of the contracting parties of the other's error, upon which the Court to some extent founded, still the true principle of decision was that there was no real *consensus* between the parties. If B had been ignorant of A's mistake, the contract, it is apprehended, must equally have been set aside. There was clear error as to the subject-matter of the contract.

The same rule is applicable to the *condictio indebiti*. The

case of *Balfour v. Smith & Logan* (Feb. 9, 1877, 4 R. 454) is one of the most recent illustrations. In this case a person having settled an account for work done discovered that he had unwittingly overpaid it by £100, for which sum he had granted a bill at four months' date. The payee recovered the proceeds of the bill, which was retired. An action for repetition was brought by the payer, who proved his mistake about the fact; he was held entitled to succeed, as there was no fault on his part giving rise to the error. The case is valuable as showing the views of some of the judges on the question of error in fact. It was held by the Sheriff in the inferior Court, and was afterwards strongly pressed in the appellant's argument, that as the mistake was avoidable, and the pursuer had the means of avoiding in his own hands, he was not entitled to recover. But this was overruled. "It is quite true," says the Lord President, "that a party having made a payment in error, must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances, or to the proceedings of the other party. If, however, the averments of the pursuer here are true, the error was distinctly brought about by the statement of the defender Mr. Smith; and if these were made as averred in article 7 of pursuer's condescendence, they were false, and false in the knowledge of the defender. To say that that is not sufficient to sustain the relevancy of the action is most startling." And Lord Shand (p. 460) states the law in general terms. "I cannot doubt," he says, "that the statements made in article 7 of the pursuer's condescendence are relevant. Assuming the correctness of these statements, the defender obtained the overpayment in consequence of his own representations, which were erroneous. If a tradesman, by sending in his account after payment, and thus by plain implication representing it to be due, should obtain payment twice, it is surely too plain for argument that he could not be heard to maintain that he was entitled to keep the money, because if his customer had examined his vouchers he would have found the first receipt, and so avoided the mistake. The present case is substantially the same. The money is said to have been paid under the mistaken belief in fact that it had not been paid already. If that be established the pursuer is entitled to repayment; and I may add that in my opinion the fact that the defender's representations induced the error is not essential to the pursuer's success. The defender has no right to retain money paid to him under a mistake in fact, which is the case stated. I am satisfied that the true rule applicable to such cases is that stated by Mr. Justice Williams in the case of *Townsend v. Crowdy* thus: 'Since the case of *Kelly v. Solari*, it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is that he must not waive all inquiry.'" It is to be noticed that in this case of *Balfour v. Smith & Logan*, the judges, with the exception of Lord Shand, seem to have been inclined to hold



that in order to sustain the *condictio indebiti* there must be, besides error as to fact, either some misrepresentation on the part of the defender inducing the error, or some negligence on the part of the pursuer in not ascertaining the fact. Now with regard to the first of these qualifications—that misrepresentation on the part of the payee is of importance—it is submitted that it is not based on any substantial ground on equity, and there is no decision establishing it. It must always be unjust and against good conscience for a person to keep what was given to him through a mistake and contrary to the intention of the giver, whether he himself contributed by his conduct to that mistake or not. In the familiar illustration used by Lord Shand of a tradesman sending in and receiving payment of his already liquidated account, it does not seem to make any real difference that the tradesman was himself under a mistake and sent in the second account in perfect good faith. As regards the other of these qualifications—that negligence on the part of the pursuer or payer bars repetition—this must be taken only in a limited sense. The negligence must be of that gross and inexcusable kind which is known to the law as *crassa negligentia*, and which is of such a kind that the Court will not aid a person who has injured himself by it. It must be such negligence as amounts to a wrong. And this, it is apprehended, is the meaning to be attached to the language of the Lord Chancellor (Brougham) in the well-known case of *Wilson & M'Lellan v. Sinclair* (December 7, 1830, 4 W. S. 398). Speaking of *error facti*, the Lord Chancellor said: "If the party who has paid the money is under an unavoidable mistake, if the mistake is no fault of his, then he may have it back; but if he has himself to blame—if he himself paid the money ignorant of the facts, and had the means of knowledge within his power, and did not use those means—he shall in vain attempt by means of proceeding at law to have it repaid him. That has been decided in our Courts repeatedly. It is a rule founded on strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong, or what is the same thing, of his own gross negligence. The ground of action being ignorance, it must be unavoidable ignorance—it must not be ignorance through his own fault—of having shut out the light by wilfully closing his eyes." The numerous specialties in this case of *Wilson & M'Lellan v. Sinclair*, and the difficulty of distinguishing in it error in fact from error in law, may have led the House of Lords to give more weight to the element of negligence than they might have done in a less complicated case. Certainly the tendency of the English decisions since that date has been to attach little if any importance to the fact of negligence in cases of this kind. (See *Townsend v. Crowdy*, 8 C. B. N. S. 477; *Kelly v. Solari*, 9 M. & W. 54.) The foundation of the *condictio* being in the *bonum et æquum*, it must be equally unjust to retain what is paid by mistake, whether the payer be negligent in making the payment or not.



With regard to *error in law*, on the other hand, it is a familiar maxim that *ignorantia juris neminem excusat*—every man is presumed to know the law. In point of fact, no doubt, this is a very complete legal fiction, as no man knows the whole law, and the number of those even moderately acquainted with it is small; but it is a necessary maxim nevertheless. To allow ignorance of the law to be generally pleaded as a defence would put an end to the administration of justice altogether. But though such is the general rule, we find, in applying it to questions of *error in law*, that it is subject to considerable qualifications. In the enforcement of private rights the Courts would have frequently to do great injustice if they were to invariably ignore the fact that a man has obtained what he is not entitled to owing to his neighbour's mistake as to the law. Accordingly in cases of mutual contract, where the contract is sought to be enforced, and the exception of error in law is pleaded, a court of equity will sustain the exception if the error is shown to be essential. The law is so stated by Bell (Principles, sec. 11): "Error in substantials, whether in fact or in law, invalidates consent, where reliance is placed on the thing mistaken." But he adds, "Although error in law, as well as error in fact, will invalidate a contract, it will not always entitle to restitution after the contract is fulfilled or money paid." Now let us see how far error in law will entitle to repetition under the *condictio indebiti*. This was the subject of a well-known controversy among the civilians, and the discussions are of much interest and value. The leading texts of the Roman law, especially Dig. lib. 22, tit. 6, l. 9, sec. 3, 5,<sup>1</sup> and Code, lib. 1, ut. 18, l. 10,<sup>2</sup> would seem to negative the right of repetition, and this is the view taken by Pothier. But, on the other hand, it has been strongly maintained by Vinnius, D'Aguesseau, and others that these texts were intended to be taken only in a limited sense, and that on principle the true basis of the *condictio* being in equity, it ought to be allowed wherever the balance of equity is found to be with the pursuer. The old rule of Scottish law was in accordance with the view taken by Vinnius. In the case of *Stirling v. Earl of Lauderdale* (26th July 1775, M. 2930) the *condictio indebiti* brought by one who had paid owing to a mistake in law was sustained. And decisions to the same effect were pronounced in the subsequent cases of *Carrick* (5th Aug. 1778, M. 2931) and *Keith* (14th Nov. 1792, M. 2933). But the authority of these cases is usually stated to have been overruled by the cases of *Wilson & M'Lellan v. Sinclair*, above referred to, and *Dixons v. Monkland Canal Co.* (17th Sept. 1831, 5 W. & S. 445). It was stated in general terms by the House of Lords in both these cases that it is not relevant for a party seeking

<sup>1</sup> "Ignorantia facti non juris prodesse; nec stultis solere succurri, sed errantibus."

<sup>2</sup> "Cum quis, jus ignorans, indebitam pecuniam solverit, cessat repetitio; per ignorantiam enim facti tantum, indebiti soluti repetitionem competere tibi notum est."

repetition to aver that he has paid under a mistake in point of law. But, as already observed, *Wilson's* case is one in which the special facts were considerably complicated; the mistake involved being partly of fact and partly of law, and the distinction between the two being thus not clearly brought out. And in *Dixons'* case the point was not directly raised for decision. Accordingly in several cases which have occurred since the date of these decisions, in which the application of error in law to the *conductio indebiti* was indirectly raised, we find considerable hesitation was expressed by the Court in absolutely accepting the Lord Chancellor's dicta as settling the law. Thus in *Dickson v. Halbert* (17th Feb. 1854, 16 D. 586), a case which was very elaborately argued, and in which it was held that error in law was a sufficient ground for reducing a discharge granted *sine causa*, both the Lord President and Lord Ivory expressed strong doubts as to error in law being in no case a ground for the *conductio indebiti*; and in the cases of *Paterson* (15th May 1866, 4 Macph. 706) and *Mercer v. Anstruther's Trustees* (6th March 1871, 9 Macph. 618) there are dicta to a similar effect. And in England there have been several decisions since the dates of *Wilson* and *Dixons* in which effect has been given to error in law in cases of restitution under contracts. The most important of these is *Cooper v. Phibbs*<sup>1</sup> (L. R. 1 H. L. 149), where the doctrine of mistake in law is stated with great force by Lord Westbury, and a good deal of the ambiguity and uncertainty involved in the earlier decisions cleared up. The action was one for *restitutio in integrum*, and the question in dispute arose substantially out of a mutual mistake between two parties to an agreement for a lease as to their respective legal rights. In commenting on the rule, *ignorantia juris haud excusat*, Lord Westbury said (p. 170): "In that maxim the word 'jus' is used in the sense of general law—the ordinary law of the country. But when the word 'jus' is used in the sense of a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded on a common mistake." Now by these observations Lord Westbury has the merit of having put the doctrine of error in law in a new and very distinct light. Much of the confusion and uncertainty to be found in some of the older decisions is undoubtedly due to the failure to clearly mark this distinction—to discriminate between what is a general provision of law, and what is merely the legal effect of a particular private right; and several fallacies in the reasoning of some of the civilians seem to be attributable to the same cause. But Lord Westbury's dicta seem to be as

<sup>1</sup> See also *Bingham v. Bingham*, 1 Ves. 126; *Broughton v. Hutt*, 3 De. G. & J. 501.

applicable to the *condictio indebiti* as to all other actions for restitution *errore juris*. If a man has paid away money under a misapprehension as to his legal rights, say under some deed, he would seem, on the authority of *Cooper v. Phibbs*, to be entitled to restitution under the *condictio*. But no doubt this will depend on how far this case can be taken to overrule the decision in *Wilson & M'Lellan v. Sinclair*.

In his statement of the doctrine of *condictio indebiti*, Bell (sec. 531), as we have seen, stated three grounds as affording the payee a sufficient defence, viz., (1) natural right; (2) implied donation; and (3) compromise. Now with regard to these three exceptions, the only one of any real importance is the first. As to the second, implied donation, it seems an unnecessary and illogical exception. Donation can only be implied where there is knowledge of no obligation, but the very basis of the *condictio* is ignorance, or to use Bell's own words, "erroneous conception of obligation or duty." With regard to compromise, this also seems a very doubtful exception. Erskine indeed (iii. 3, 55) regards it as an improper exception, for he says, "When a sum is paid in consequence of a transaction, the sum paid is truly due, the debtor having bound himself to pay it at finishing the transaction, for avoiding the expense or uncertainty of a lawsuit; so that though there had been no obligation of debt, either civil or even natural, anterior to the transaction, the transaction itself forms an obligation, and so creates a debt." The very essence of compromise must be knowledge on the part of the payer that his duty or obligation to pay was doubtful; and no Court will assist a man to get back what he has paid in that view on his finding afterwards that he did not require to pay anything. As expressed by an English judge, there is "a waiver of all inquiry." But the first exception—that no man is bound to repay what he has a natural right to retain—is a real and important defence to the *condictio indebiti*. It is thus put by Bell (Principles, sec. 532): "As restitution is grounded on equity, it has no place if the transference or payment have proceeded on a natural obligation; for that is binding in equity as a bar, although it would not have grounded a demand at law." As the foundation of the *condictio indebiti* is in the *bonum et æquum*, he who invokes the aid of a court of equity cannot well expect to succeed if he be met by the plea of an adverse equitable right. To use the expressive language of the English law, "he who seeks equity must do equity;" or "he who seeks equity must come with clean hands." Where a person has paid a debt which is due in point of honour—as, for instance, a gambling debt—and seeks repetition, it is plain the Court will not listen to him, though it would equally have refused to aid the payee had he been pursuer. So it will not interfere where a person has paid a debt which was prescribed or contracted by him during infancy, and brings the *condictio* pleading his mistake of fact or of law. In all such cases there was a

natural obligation on the pursuer to make payment, and having done so the original imperfect right in the payee to obtain becomes a perfect one to retain. In the Roman law the legal effect given to natural obligations—*nuda pacta*—in the way of exceptions to actions was very extensive. *Nudum pactum non parit actionem sed parit exceptionem*. There seem to have been three classes of obligations to which this effect was given, viz.: first, obligations valid according to the *jus gentium*, though not by the rules of the civil law; second, obligations arising from those conventions which the Roman law invalidated by exceptions introduced *in odium creditoris*; and third, obligations *ex pietatis causa*. But the law of Scotland has not followed the civil law subtleties in regard to naked facts, and no classification of the natural obligations which will bar the *condictio indebiti* would be possible. It may be stated generally that whatever would be regarded in the forum of good faith or good conscience as an obligation to be implemented, will be held sufficient to exclude the *condictio indebiti*.

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## WHAT JUDICIAL FACTORS CAN BE APPOINTED BY SHERIFFS, AND HOW THEY MAKE UP A TITLE.

### NO. II.

ANOTHER question besides the competency of the factor's appointment was raised and decided in the case of *Johnston v. Lowden*. It related, as we saw from the opinions of Lord President Hope and Lord Corehouse quoted in our last, to the way in which the factor behoves to make up his title. Whether should he make up his title in his own name as factor, or in the name of his ward? Both these judges seem to have been in favour of the factor making up his title, that is, expeding confirmation, in the name of the ward, although holding that the other mode was not incompetent. This ambiguous position seems to have been maintained up to the present time.

The Act of Sederunt of 13th February 1730, the principles of which are as applicable to Sheriff Court factors as to Court of Session factors, expressly enacts (sec. 7) that "where it is necessary by law that such money or effects or moveables should be confirmed, the said factor may confirm the same in his own name as executor dative, and as factor appointed by the Lords of Council and Session on the estate of such a person, and for the use and behoof of the said person, and of all that have or shall have interest, unless some other person having a title offer to confirm, and shall put in the said clerk's hands a just and full copy of the said testament, and of all eiks he may afterwards make thereto, within

the space of three months after the confirmation, and that under the penalty of such a mulct as the said Lords shall modify."

The whole Court in 1857, in the well-known case of *Macnochie* (4th February 1857, 19 D. 366), had this question under consideration. The case related, no doubt, to a Court of Session officer and to heritable estate, but that does not seem to affect the principles on which the matter of title was decided, and which are common to all officers where there is a ward. Lord Curriehill (in whose opinion three other judges concurred, and from whose *dicta* on this point none even of the minority dissented) laid it down (p. 372) that "a guardian of any kind, whether or not his appointment be preceded by a cognition, is not as such vested with the *dominium* of the ward's estate, and he does not act *qua* owner thereof. He acts for the owner, and as his representative. The maxim *qui facit per alium facit per se* applies to such cases. Although the authority of a guardian is derived from a different source from that of a mandatory, yet as a mandatory, although not vested with the real right or ownership of the subject of his mandate, exercises on behalf of his principal the powers of ownership belonging to the latter so far as these are within his delegated authority, so such a guardian, although not vested with the real right or ownership of his ward's estate, exercises on behalf of the ward the powers of ownership belonging to him so far as these are within the authority delegated to him either by law or by special grant. This is the case as to his actings in matters falling under his usual powers; and it is also the case in matters falling under any additional or special power which may be conferred upon him. And accordingly in such cases where the title of the ward is not made up, the practice is that the guardians pray for and obtain special powers, first to make up titles in the person of the ward, and then to sell or burden the property so to be vested in the ward's person, in order to raise funds for paying his debts. The case is different as to a judicial factor appointed on a trust-estate in consequence of the non-acceptance or death of testamentary trustees, because in such a case there is no existing *dominus* of the estate, and the judicial factor, *qua* such merely, is not in the position of being either a fiduciary owner or representative of an existing owner of the subjects. And hence, if in the performance of his factorial duties as to the trust-estate which is in abeyance, it becomes necessary to exercise such powers of ownership as selling, burdening, or entailing the estate or disposing it to the beneficiaries, the factor must obtain the fiduciary fee of the estate vested *habili modo* in his person; and in such cases the Court is in use to authorize him to do so. But this is not necessary or proper in a case like the present, where the fee is not in abeyance but is vested in its proper owner; and where his guardian in the due exercise of his powers, whether they be the usual powers of his office or additional powers specially conferred upon him, acts

merely in place of that owner. And accordingly, in the long practice which has established the jurisdiction of the Court in this matter, the guardian has never in such a case been required or empowered to obtain the fee of the estate transferred from his ward to himself, and vested in his own person." There is thus sanctioned an important limitation of the enactments of section 7 of the Act of Sederunt of 13th February 1730.

The latest writer who treats of the matter is Professor Montgomerie Bell. In his *Lectures on Conveyancing* (2nd edition, vol. ii. p. 1120) he says, "Though the executor be a pupil or minor, the title by confirmation ought to be made up in his own name, provided he has a tutor or curator—the tutor of course taking the oath in the case of a pupil, and the curator concurring in the oath in the case of a minor. Where the pupil or minor has no tutors or curators it is usual to carry through the proceedings in the name of a factor appointed by the Commissary." Mr. Fraser (*Parent and Child*, p. 244) says that "whether his estate be heritable or moveable, the pupil and not the tutor ought to be served to the former and confirmed to the latter." Mr. Fraser, although Sheriff of Renfrew—and his editor is Mr. Cowan, his Sheriff-Substitute—takes no notice of factorial appointments by the Commissaries. This leaves the matter very much as Mr. Montgomerie Bell puts it, and that leads to a limitation of the cases in which such factors are to be appointed.

1. As regards pupils who cannot appoint guardians,

To the cases (a) where there is no nomination, and no one can claim or is willing to serve as tutor-at-law, and (b) even where one might serve, the estate is too small to bear the expense; and

2. As regards minors,

To the cases (a) where there is no nomination, and he cannot get any one to act as his curator; (b) where the estate is too small to bear the expense; and (c) where a factor being necessary for a pupil brother or sister, the same application can be utilized for a factor to the minor.

A further limitation to such appointments seems to have been imposed by the Commissaries. Sheriff-Substitute Hallard, in *Skirving's* case, states that "the circumstances of this case as disclosed in the petition exhibit an estate of which the solvency is doubtful, and where the step proposed to be taken is one primarily for the benefit of creditors. The interest of the pupils comes only in the second instance. This is not the kind of case in which, according to the practice of this Court, a factor for pupil children is named to be thereafter confirmed as executor on their behalf."

Creditors of the ancestor have in such cases a choice of remedies. One of their number may obtain confirmation as executor creditor, the responsibilities of which office are well known. Or resort may



be had to section 164 of "The Bankruptcy (Scotland) Act, 1856" (19 and 20 Vict. c. 79). But the remedy under that Act is entirely confined to the Court of Session (*Macfarlane*, 6th March 1857, 19 D. 656), while the former is the cheaper remedy, and obtainable in the Commissary, now the Sheriff, Court.

In that case of *Macfarlane* some valuable remarks fell from the Lord President as to the persons to be appointed factors, which seem equally applicable to the Sheriff Court factors, with whom we are dealing. "It is very necessary that we should not, so readily as we were in use to do, adopt the party suggested by the petitioning creditor. I have no doubt as to the respectability of this person, but the course we intend to adopt in future is that we shall ourselves make inquiry as to the matter without any respect to the nominee of the petitioners." That case was one where the most of the parties interested were major and *sui juris*. Where, on the other hand, the Court are dealing with minors and pupils, it behoves that even more care, if that be possible, should be exercised in canvassing the *status* and merits of the person nominated in the petition as factor. A creditor of the ancestor would evidently be a most objectionable person, and others can easily be supposed to be more or less disqualified.

Some guarantee seems to be afforded in the Edinburgh Sheriff Court by the understanding that the office of factor is a gratuitous one (see Mr. Hallard's note in the case of *Skirving*). But in other sheriffdoms this may not be so. Indeed there seems to be no reason why it should be so if a factor really discharges the duties of the office he undertakes.

It is impossible, however, from the fact that no accounts are ever rendered in the Edinburgh or any other Sheriff Court, so far as we can learn, to know whether the factor has acted gratuitously or how he has discharged his duties. This state of matters is a scandal, and calls for immediate remedy at the hands of the Sheriffs.

It is admitted that even in Court of Session factories grave irregularities occur. It required the Pupils' Protection Act (12 and 13 Vict. c. 51, 28th July 1842) to put a stop to these in regard to appointments for the protection of minors, pupils, and absentees. But as regards other factories the Law Commissioners reported (Fourth Report, p. 14): "It is also desirable that judicial factors on trust-estates and other estates not under the Pupils' Protection Act should be put under the control of the Accountant of Court; but a difficulty arises from the limited nature of the investments authorized by him, and the consequent loss to the estate to which we have before adverted. Some additional expenses would also no doubt be caused by the periodical audit of the accounts, but the advantage of the superintendence of the Accountant of Court is very great, and we recommend that his duties should be extended to the control of all judicial factors. This would necessitate an

increase of the staff in the Accountant's office and of his salary. But this expense might be met by making a small fee payable from each estate, as in cases under the Pupils' Protection Act." It will be in the recollection of our readers that these Commissioners reported (Fourth Report, p. 31) as regard factors to be appointed by Sheriffs, that "all such officers when appointed should be under the superintendence of the Accountant of Court."

That this interference with and supervision of judicial factors has been suggested not a day too soon further appears from a statement prepared for and adopted by the Society of Writers to the Signet in 1878:—

IV. Neither the clerk to the process, nor the Accountant of Court, has any control over such judicial factors, who may or may not lodge rentals and annual accounts, may invest or retain the funds in their own hands as they please, and may or may not renew their bonds of caution in the event of the death or insolvency of cautioners.

V. The estates under their charge are thus, in effect, in the hands of the judicial factors without any direct supervision or control by the Court or an officer of the Court. Loss, therefore, may arise, and in many cases has arisen, to beneficiaries whose estates are administered by such factors, from—

1. An inventory or rental, or both, not being in many instances lodged.
2. The kind of investments accepted.
3. The absence of investments of any kind.
4. The want of supervision as to lodging accounts.
5. The death or insolvency of the factor or cautioner.
6. The possession of the heritable or other estate by the factor at an inadequate return, or none at all; and—
7. The want of a yearly audit.

VI. Practically the right of the beneficiaries to apply to the Court for remedy is never, or at least very seldom exercised. The beneficiaries may be pupils or minors, or absent from the country, and many of them may have only contingent rights. The factor's accounts are only examined at the termination of the factory (which may have extended over a long period of years), when the responsibility of both factor and cautioner may have entirely changed; or on a special application to the Court by the factor for interim approval, which is, however, but rarely made.

If these evils have arisen and have become so clamant in regard to Court of Session appointments, what must be the state of matters in inferior Courts, where no discharge has ever been sought or accounting has ever taken place?

The question of expense in connection with the improvement suggested by the Law Commissioners is dealt with by them, and they proposed a fee "payable from each estate, as in cases under the Pupils' Protection Act." The Writers to the Signets' statement shows that such a fee would amply suffice:—

VIII. In regard to the increase of staff referred to by the Law Commissioners, it may be sufficient to say that there is at present a surplus income from the fees exacted in the Accountant's office, which, along with a similar scale of fees extended to judicial factories on trust and other estates, would be more than sufficient to meet the expense attendant upon any increase following upon such estates being brought under the Accountant of Court. The Annual Report adverted to at top of page 2 [that is, Report for the year ending 31st

October 1876, issued by the Accountant of Court as required by the Pupils' Protection Act, sec. 18] shows the surplus fees to amount to over £4500.

And again—

The Accountant's audit fee for each annual account at present lodged in his office under the Pupils' Protection Act is 10s. 6d., besides a small percentage on the factor's commission. Independent of the obvious advantages of the annual scrutiny of the Accountant of Court, the expense thereby occasioned would not, particularly in the case of a small estate, affect it to the same extent as the cost of a special application for audit, or even a remit to an accountant at the end of the factory.

It is well enough known that certain much-required legal reforms have, under the present and last Governments, been delayed in consequence of the financial demands which they involved. Lord Gordon, while Lord Advocate, had a bill prepared to enable Sheriffs to appoint factors on estates below a certain amount, and to put *all* judicial factors under the supervision of the Accountant of Court. The excuse for its never having been *brought in* is popularly believed to have been that its proposals were barred by imperial parsimony. It was to rebut this that the Writers to the Signet undertook an examination of the pecuniary aspect of the proposed change. That examination shows that there is no excuse for the so long-continued neglect of Scotland and her interests in this matter.

One is glad to see, now that Government have abdicated their function of initiating beneficial legislation for Scotland, that private members are doing something. Mr. Ramsay, M.P., towards the end of last session, introduced a bill to carry out the recommendations of the Law Commissioners and achieve the objects Lord Gordon had in view in his bill. Mr. Ramsay has already got leave to introduce a bill having a similar title this session, and when copies of it are issued we will be able to judge of the measure. Our remarks on the powers which Sheriffs presently possess will have been of some value if they assist in making Mr. Ramsay's bill a remedy for the evils which presently exist.

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## NOTES IN THE INNER HOUSE.

THE case of *M'Bey v. Knight*, recently decided by the Second Division (November 22, 1879), may be said to have determined two questions of some importance relating to the jurisdiction of the Sheriff. These are—(1) whether the fact of a defender possessing heritage or holding a lease of property within the territory of the Sheriff confers jurisdiction, and (2) what is the effect of the 46th section of the Sheriff Court Act of 1876?

The pursuer in this case, a horse-dealer in Aberdeenshire, raised an action in the Sheriff Court of Banffshire for the price of a horse against a defender who was designed as a coffee-planter in Ceylon,

and joint tenant of a farm in the county of Banff, where it was further alleged he possessed heritable property. The citation following upon the summons was one of seven days' *inducia*. It appeared from the record that the defender had been absent from Scotland for more than a year. The Sheriff-Substitute, and afterwards the Sheriff, dismissed the action upon the ground of want of jurisdiction to entertain it, and their judgments were adhered to by the Court of Session.

There was one argument urged for the pursuer which could not seriously be maintained, that which sought to found jurisdiction upon the fact of Banffshire being the place of contract. For, as pointed out by Lord Ormidale, this would be insufficient to found jurisdiction even in the Supreme Court against a defender resident out of Scotland. Nor could the fact, even had it been established, that the defender retained domicile in the county while abroad for a temporary purpose avail the pursuer, as a mere domicile of origin could not found jurisdiction in a personal action for debt or *ex contractu*.

Of more importance, however, was the fact that the defender held a lease of property in the county, and was himself a proprietor. As tenant of a farm, the servants who worked upon it were his servants and the house his residence, in theory at all events. "The possession," says Mr. Wilson, "of heritable property within Scotland is a ground of jurisdiction in the Supreme Court in all kinds of actions except those relating to status, but it has not been decided whether that could form a ground of jurisdiction in the Sheriff Court; and as the jurisdiction is an anomalous one, probably the want of a practice to justify it is decisive against its existence." This opinion has been confirmed by the decision in the present case. Lord Ormidale observed, "For myself I have always understood that the ownership by a defender of real or heritable estate within the kingdom was sufficient to found jurisdiction against him in the Supreme Court only as the *commune forum* to all persons residing out of the kingdom." And he points to the absence of any authority for the opposite view, while he finds in the case of *Burn v. Purris* (7 Sh. 194) confirmation of his own. In that case, decided by a full bench, it was held that arrestments of the property of a foreigner, although they were sufficient to found jurisdiction in the Supreme Court, had no effect in that of the Sheriff. Lord Gifford said, "Mere proprietorship of heritable subjects has never been held to subject the owner to the jurisdiction of a sheriff, he not being personally cited within the county, and possibly never having been within Scotland in his life."

But the most important argument for the pursuer was that which raised the second question already mentioned. It was contended that the 46th section of the recent Sheriff Court Act was applicable in respect of the joint tenancy of the pursuer under a lease binding to personal residence. That section confers upon the

Sheriff jurisdiction over persons carrying on a trade or business within his county, although they have their domicile in another county, provided that they have been cited personally or at their place of business, and it was contended that a farm was a place of business in the sense of the Act. Lord Gifford, who dealt with this argument, after pointing out that mere joint tenancy in a farm apart from any allegation of carrying on business was clearly not enough, remarked: "In reference to the provision of the recent Sheriff Court Act, although joint tenancy and joint occupancy of the farm along with the father is averred, it is not said that the father and son carry on business as partners in the county, or have as such any place of business there. It was said this was implied in the averment of joint occupancy of the farm, and that the farmhouse must necessarily be the place of business of all the joint occupants of the farm, however numerous they might be, and although none of them might in point of fact reside there. I cannot assent to this. The farmhouse might be occupied by only one of the joint tenants, or perhaps only by a grieve, and in no sense can a farmhouse be held to be the place of business of all the joint tenants of the farm." Further, he thought that the clause had no application to a person residing abroad and having merely an interest in a farm in Scotland, and he doubted whether farmers could be included in the expression "persons carrying on a trade or business." We observe that Mr. Wilson in his treatise upon the Act of 1876, while expressing the opinion that this section does not apply to persons having their domicile abroad, raises the question whether it would not cover the case of an action against a foreigner arising out of the trade or business carried on by him within the county, and he thinks that the question should be answered in the affirmative. Lord Gifford certainly points out in *M'Bev's* case as a fact unfavourable to the pursuer, that it was not averred that the contract sued on had any relation to the farm business, and it may be said that if it had been otherwise, his opinion might have been different. But on the other hand, Lord Ormidale distinctly says that the enactment applies "not to a defender residing abroad, but merely to a defender residing in a different county from that in which the action is brought." This is, indeed, the common-sense view of the section, for had it been intended to give a wider jurisdiction, why use the expression "another county"?

The case of *Wilson v. Orr* (Second Division, November 22, 1879) relates to the *onus* of proof as to the cause of loss where an article lent has been destroyed. The defender had taken a horse from the pursuer on the understanding that its work was to pay for its keep, and that it was to be returned when asked for. The horse died in defender's keeping from gangrene caused by some injury. Sheriff Guthrie, by whom the case was first decided, holding that in a case of location the lessee must prove that the loss was due to some

cause for which he was not responsible, and that here he had failed to do so, gave decree against the defender. On appeal the defender maintained that there was no obligation upon him to show the actual cause of injury. But the Court adhered, the Lord Justice-Clerk observing, after a review of previous cases, "I therefore assume that the hirer here was bound to show the cause of injury from which the horse died, and (2) that it was a cause for which he was not responsible." Mr. Dickson, in his work upon the Law of Evidence, mentions this class of cases as affording illustration of this exception to the general rule, viz. that a party must prove his averment either affirmative or negative if of a fact peculiarly within his knowledge. Under the Mercantile Amendment Act it may be remembered that a statutory liability is incurred by carriers when goods committed to their care have been destroyed by fire. As regards custodiers, the law has thus been laid down by Lord President Inglis in the case of *Moes* (July 3, 1867, 5 Macph. 988), "The *onus* of proving negligence on the part of a custodian not being a carrier lies upon the owner of the goods."

In the special case *Dunsmure and Others* (Second Division, November 22, 1879) the Court were called upon to determine the meaning of two words of not uncommon occurrence in writings of a testamentary nature, viz. "money" and "will." A holograph bequest by a husband to his wife of "all moneys and goods in my possession at the time of my death," the Court held to indicate a universal succession. The expression, the Lord Justice-Clerk held, was sufficiently elastic to apply to money in its strict sense alone, or to a person's whole moveable estate. There was also a bequest of money to which the testator was entitled by "my late father's will or any other will," and this was held to cover money which came to the testator under the marriage contract of his father.

The case of *Dempster v. M'Whannel and Deas* (November 26, 1879, First Division) has decided several points of importance relating to the parochial settlement of paupers. The first point which the Court were called upon to consider was at what period a girl who had attained her majority was forisfamiliated so as to enable her to acquire a settlement for herself in distinction to that derived from her father. She had come with him and the rest of his family to Greenock in April 1866, and in November of that year got employment as a domestic servant, working during the day at her master's house, but returning to her father's at night. It was not until Whitsunday 1868 that she obtained a situation which took her entirely from her father's house. The Court held that she was forisfamiliated in 1866, and that from that date the period of her settlement began to run. The fact that she was supporting herself the judges held sufficient to enable her to acquire an independent settlement. Erskine says, treating of the father's power, "The father's administration is restricted, with us, to such of his children as continue in family with himself; and a



child is, as to this question, held to continue in his father's family, though he should reside elsewhere, if he earns not his livelihood by his own industry and labour independent of any aid from his father" (i. 6, 53 and 55). In this case we have the converse of that put by the learned writer, viz. residence in the house of the father while earning a livelihood.

The next question was whether the progress of this settlement was interrupted, because when the father left Greenock in September 1869 for Argyleshire, and remained in that county until Whitsunday 1870 engaged in his trade, she had gone with him along with the rest of the family. The house in Greenock had been retained and rent and taxes paid, and at that time it was her residence. The Court decided the question in the negative, considering that there was no essential difference between the case of the father and of the daughter, and that it was clear that absence for a temporary purpose did not affect his settlement. But Lord Mure had some difficulty. "It has been held," he observed, "that when a man so removes out of the parish where he has been residing, in the prospect of getting work, and leaves his family behind him, his residence in the parish which he had left is not interrupted, but my difficulty is whether that applies to the case of a forisfamiliated daughter when she leaves her parish of residence merely to join her father. If we are to say that the rule does apply, then we are going farther than we have ever done before." He concurred, however, looking to the fact that the girl had her residence in her father's house in Greenock, and that she had only gone to join him for a short time, and returned back with him to the same place. But the parish of Greenock sought to get rid of the pauper upon another ground. During an epidemic of fever she had been admitted into the infirmary under an arrangement made between the parochial and other authorities in the interests of the public, and it was alleged that her acquisition of a settlement had been in this way interrupted. It appeared, however, that during her illness the doctor's fees for attendance were paid either by her family or friends, and that there had been no application by them for parochial relief. In these circumstances the Court were unanimous in holding that there had been no interruption of the residential settlement. Lord Deas characterized the question raised as one of importance and general interest, but remarked that "it would be startling if we were to hold that whoever is compulsorily removed to an hospital by the local authorities because suffering under an infectious disease is reduced to the status of a pauper."

The case of *Gray v. Binny* (5th December 1879, First Division) adds another to the list of important decisions by means of which the doctrine of our law relating to the reduction of deeds is being developed, and is valuable as containing the opinions of several of our most able judges upon this subject. A young man unac-

quainted with business habits is induced for, at the best, a very inadequate consideration to consent to the disentail of an estate. No positive fraud is perpetrated, no lie told. The Court did not rest their judgment upon misrepresentation, if there was any. The consenter was a major at the time, in full possession of his faculties, subjected to no force, alarmed by no threat. Nevertheless he has prevailed in his action of reduction and the deed has been set aside. The Court gave full weight to the fact that the pursuer had here, under circumstances which rendered it very natural to do so, placed perfect confidence in those who sought his consent—his own mother and the legal adviser of the family. The Lord President laid down that the pursuer must prove deceit or unfair dealing as well as inadequate consideration and ignorance of his own right; but then he adds, "In order to determine what kind and amount of deceit or unfair practices will be sufficient to entitle the injured party to redress, regard must always be had to the relation in which the transacting parties stand to each other." He draws a wide distinction between the case of strangers dealing with each other at arm's-length and of those whose mutual relation is such as to beget mutual trust and confidence. In the latter case, if the trust and confidence is all given on the one side and not reciprocated, the party trusted in is bound "not to abuse the power thus put in his hands." In Lord Shand's opinion the case "belonged to a class in which a remedy will be given by the law on grounds which do not necessarily involve the conclusion that the party who obtained the deed was actuated by a corrupt motive or was guilty of deceit. The case is one in which confidence was invited and given, and parental influence unduly used by the pursuer's mother with the assistance of her agent, in procuring a deed to her own great advantage and to the corresponding disadvantage of her son; and a deed so obtained is, I think, liable to be set aside without affirming that it was procured through fraud."

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## THE REGISTRATION APPEAL COURTS OF 1879.

### I.

AMONG the many and varied signs which indicate the near approach of a general election there is perhaps none more certain than that given by the number, variety, and character of the appeals presented to the judges sitting in the Registration Appeal Court. If we turn back to previous reports, we find that as in 1879, so in similar circumstances in 1868, and in other years, the crop of appeals was a large and important one. On the present occasion we are glad to observe a change in the order of reporting adopted by the editor of the "Scottish Law Reporter," and it is evident that the method of

continuously and separately numbering these cases in his publication must greatly simplify references both in and out of Court. We have resolved to make an attempt at giving, within very moderate compass, a sketch of the results of the decisions last November, throwing together, so far as practicable, cases of an allied character.

In *Paterson v. Johnston* (No. 1, 17 Scot. Law Rep. 152) we have an extension of the franchise to shooting tenants as such, even where there was no heritable property, such as house, etc., attached to the right of shooting. Certainly the decision appears only to be the logical result from the case of *Richardson v. Steuart* of last year. In that case the tenant had with his shooting a cottage, which he occupied by his own servant the gamekeeper, and although the cottage was in itself insufficient to give him a qualification, he was allowed to supplement the rent of the cottage by that of the shootings, and to slump them in fact all together. At the time that judgment was seriously discussed, and it certainly seemed then, and to many seems yet, highly anomalous that the addition of a non-heritable right to heritage will be permitted so to add to the value of the latter as to render the whole good for electoral purposes. The cottage leavened the mass. This could not remain without further decision and, as it has proved according to expectation, further development. Has the Registration Appeal Court added "shootings" to the list of what constitutes heritable property in the kingdom, or have the judges merely proceeded on the view that the provisions of the Valuation Act, by rendering "shootings" the subject of assessment, gave the tenants a voting qualification? We can scarcely think that the Courts of the present day would take those feudalistic views of the distinction between real and personal property which in former times were universally accepted. Then a mere bond for payment of money became heritable in its every character, because its security rested on the sacred basis of the soil; it was in those days that salmon-fishings and their rights grew to be what even yet they are in a legal sense. This does not seem to have been the view adopted by the majority of the judges in *Paterson v. Johnston*. Rather their opinions were founded on the provision of the Valuation Act and of the Reform Act. In 31 and 32 Vict. c. 48, sec. 6, it is enacted that every person who has been for twelve months prior to the last day of July in the actual personal occupancy as tenant of lands and heritages of the value of £14 or upwards, as appearing on the valuation roll of the county, is entitled to be registered. In that statute no interpretation is given of the term "lands and heritages." But, as Lord Mure observed, "we are referred to the valuation roll for an explanation of the term, and I know of no statute to which we can more safely look for an explanation of the meaning of the words than to the Valuation Act itself; for it is in the assessor's list prepared from the roll made up under the Valuation Act that the

names of parties qualified to vote are to be found. Now by the interpretation clause of that Act it is provided that the words 'lands and heritages' shall in the construction of the statute be interpreted to extend to and include 'all lands, houses, shootings, and deer-forests, where such shootings and deer-forests are actually let.' In the view, therefore, which I take of this clause it is imperative on the assessor to put upon the valuation roll as tenants of 'lands and heritages' all persons who are tenants of shootings actually let." This quotation from Lord Mure's opinion sufficiently shows the view taken by the majority of the Court as to the effect of the Valuation Act. On the further objection taken, that even were this so, yet shooting is so purely a personal privilege, a *jus spatiandi*, Lord Mure thought *Pollock v. Gilmour* had been overruled by the cases of *Sinclair v. Duffus* and *Menzies v. Stirling Crawford*, but especially by that of *Macpherson*, which was regarded as entirely superseding *Pollock*. In dissenting from these views Lord Ormidale pointed out with firmness that the effect would be to create a new franchise, and to go in the face of the law and practice of the country, more particularly as evinced by the case of *Dawson v. Watson*. That case his Lordship deemed entirely in point, alike in its result, in the circumstances under which it arose, and in the form of the argument addressed to the Court. The opinion of Lord Ardmillan in *Stirling Crawford's* case, cited in *Dawson v. Watson*, contains the following remarks: "The privilege of shooting, apart altogether from its being exercised by the proprietor—the communicated privilege of shooting—is like the privilege of walking in a garden, of drinking at a fountain, of bathing in a stream, of using a boat upon a lake, of gathering mushrooms, of trout-fishing, of golf-playing, and many other things which might be suggested. They are privileges of use of a particular kind, but they are none of them rights either of the proprietorship or tenancy, and do not imply the exclusive possession of the land. A right of shooting is not the proprietorship of land, nor is it in any proper sense the tenancy of land, for the land is held for no other purpose than that of firing guns over it. The mere privilege of discharging a fowling-piece for killing grouse or hares or rabbits, when disconnected from the possession of a house, is not a right to a heritable subject on which a party can stand as the basis of a qualification if he has no other right apart from it." Lord Ormidale observed that "the successful argument in that case was precisely that of the respondent in *Paterson v. Johnston* upon which we are now commenting, and added that the remarks of Lord Ardmillan just quoted "indisputably apply to the present case, so that in my apprehension it is impossible to decide the latter differently from *Dawson v. Watson* without entirely disregarding the decision in that case. I for one am not disposed to do so, the more especially keeping in view that the judgment in *Dawson v. Watson* was unanimously pronounced in a Court of three judges, including Lords Benholme and Ard-

millan, affirming a deliverance of the Sheriff of Haddington, Mr. Clark, now Lord Rutherford Clark. It is impossible to suppose that all these persons, learned and distinguished as they were, should have been ignorant of the law, and especially of the cases of *Stirling Crawford* and the rest of these now relied on, for all of these cases had been previously decided."

So much for the matter of authorities, but upon the question of the Valuation Act and its effect we may also perhaps quote one or two sentences from Lord Ormidale's opinion, sentences which put extremely well the difficulty, to say the least of it, into which this decision has led: "I have now only further to notice in a few words the argument which was addressed to the Court on the 42nd section of the Valuation Act, 1854, to the effect that the expression 'lands and heritages' when used in that Act should be held to include 'shootings,' and on section 58th of the Reform Act of 1868, to the effect that it, 'so far as is consistent with the tenor thereof,' shall be construed along with the Valuation and some other Acts. But how this can be held to subvert the fundamental principles of the Enfranchising Acts I fail to see. It is certain that no such argument was given effect to either in *Dawson v. Watson* or any of the other cases or authorities to which reference has been made, although, as already mentioned, the Acts upon which it is founded had been in operation for many years previously."

The case we are now considering was an appeal from Dumbartonshire, but there were also appeals upon similar questions from Perthshire and Inverness. In all of these cases the learned Sheriffs had decided against the shooting tenant, but the law must in the meantime be regarded as altered; tenants of shootings are tenants of "lands and heritages," and thus "shootings" are "lands and heritages." Lord Mure had some hesitation in arriving at this result in the face of *Dawson v. Watson*, but regarded that as overruled by *Macpherson*. Lord Craighill, however, does not appear to have had the least doubt. "It appears to me," says his Lordship, "that the question is settled by the Acts of Parliament," and he further expresses the opinion that "shootings under lease are lands and heritages."

We do not further enter into this matter, but the door having been opened for novel applications, it is difficult to say whether the Court could reject a claim based on tenancy of a cricket-ground or of golf-links. The fact of the lands being let otherwise for grazing, etc., is no obstacle, that being the case almost invariably in these shooting tenancies, where the benevolent interpretation of the franchise has blessed the soil with many electoral rights, and recognised at once a laird, a tenant, and a wanderer in pursuit of game.

As is usual in all Registration Appeal Courts, another old friend, "defeasibility of tenure," made his appearance for 1879 in three amongst the reported cases, and several times more in the herd of



decisions not deemed worthy of or suitable for posterity. *Donaldson v. Arrol* (No. 4, 17 Scot. Law Rep. 159) was a case turning more upon occupancy than upon defeasibility, but as both questions were raised, we may in the shortest way possible refer to the case as one of defeasible tenure. The landlord had in writing admitted to the assessor that the claimant was his tenant prior to 31st July 1878, and that could never have been resiled from, which appeared at least to Lords Ormidale and Mure to settle that point; but there was also the matter of occupancy. The lease was dated 14th August 1878, but the entry was stated as at 1st July 1878, and the tenants actually entered into occupation at that date. There was no rent charged or paid for July, however, as the works were under repair. This being so, the Sheriff's judgment in favour of the claim was sustained, although Lord Craighill considered that all the Sheriff's findings in fact came to was "that there had been an admission to the premises, not that they were in occupation as tenants." *Crawford v. Johnston* (No. 9, 17 Scot. Law Rep. 164) was truly a case of special circumstances in which a verbal lease was held as being good at least to the extent of for one year, making two sons joint tenants with their father under a formal lease. The third reported case in which the "defeasibility-of-tenure" argument was used was that of *Stewart v. Adair* (No. 27, 17 Scot. Law Rep. 179). It is a matter of satisfaction that the person objected to in this instance was retained upon the roll, a result, after all, mainly due to the almost accidental insertion of certain words in the minute by which he was appointed to his situation, and to the fact that he had been for nine years an elector. The facts were very simple. Stewart was a gas manager, and had been so since 1869. In the last three valuation rolls he was duly entered as tenant and occupant of the house he occupied in his official capacity. Fortunately for him, when he was appointed the minute bore that he was to have a certain salary "with a house and other perquisites the same as Mr. M." (his predecessor); and fortunately, also, for him, Mr. M. left the service of the gas company between terms, but continued afterwards until the ensuing term to occupy the house in question. This saved Stewart, who remains on the roll. We cannot, however, refrain from here pointing out the anomalous state of the registration law to which this doctrine of defeasible tenure is rapidly reducing us. No Act of Parliament, so far as we know, says one word about the defeasible character of the tenure; that is a peep into futurity which it was reserved for the Registration Appeal Court years ago to take. The Legislature has required clearly enough a certain term, we may not incorrectly call it a probationary term, of residence as owner or tenant, to qualify for the franchise. The Court have added to this the *paulo-post* future of electoral existence. We believe that it never was the intention of Parliament to call in question the franchise of any person who had for a sufficiently long period occupied in ownership or tenancy the qualifying subjects.



If he ceased to do so after the roll were made up, then he was to be struck off the next year; but till then, just as in cases of a lease coming to an end, or of a proprietor selling his land, the name should remain on the register. Just as well might a landowner who had advertised his estate for sale, or a tenant under notice to quit, be struck off, as Mr. Stewart would have inevitably been had he not been saved by the peculiar circumstances of his case. The laird may in a week after the Court cease to own an acre, the tenant may in two months' time be farming in Arizona, yet both stand stoutly on the roll, while the poor victim of defeasible tenure (who may be a gentleman in a high position as regards both personal influence and intellectual power) is disfranchised, because possibly he may lose his appointment and with it his qualification, though he has enjoyed them both for a period long beyond that requisite amply to confer on him under other and less technical conditions full electoral rights. This matter we have only referred to as one of those which it may be hoped will ere many years pass by become the subject at least of an amending statute.

The position of the valuation roll in questions relating indirectly to value was raised in *Morrison v. Anderson* (No. 8, 17 Scot. Law Rep. 164), and in *Wilkie v. Adair* (No. 25, 17 Scot. Law Rep. 178). In the former of these cases extraneous proof of the value was allowed where a tenant's omission to make a return had caused the proprietor's name to be struck off the roll of voters, and in the latter the entry in the valuation roll was sustained as conclusive where a tack-duty payable on the whole of the school buildings had been entered by the assessor as against the schoolhouse only, thus excluding from the tack-duty the master's house, and, as it was of the value of £5 exactly, giving him the benefit of the franchise. Although Lord Ormidale pronounced a strong opinion on the general principle, yet that would appear to have been somewhat an *obiter dictum*, as his Lordship and the other judges went considerably upon the fact that the whole tack-duty was paid by the school board and not by the teacher. The appellant (the teacher) urged that as the assessor had statutory power, under section 16 of the 1868 Reform Act, to call for information as to burdens in making up the valuation roll, he must be presumed to have done so; and Lord Ormidale in giving effect to this contention observed: "The valuation roll is thus set up, and my reading of the statute leads me to the conclusion that it is intended that the valuation roll should be complete in itself irrespective of all extrinsic inquiries. This is my strong impression, but it is not necessary absolutely to determine that question in the present case. There are here two subjects. In the valuation roll, so far as the schoolmaster's house is concerned, there is no entry under the column 'feu-duty or ground-annual,' while the whole tack-duty payable is entered opposite the 'schoolhouse.' We have it also stated as a fact that the whole duty was paid by the school board in one sum. The

master therefore holds his own house free from burden, and it is of the value of £5." Lord Mure, while concurring in the special circumstances, expressed doubts, founded on the 17th section of the Burgh Voters' Act of 1856 (19 and 20 Vict. c. 58), as to whether the Court could not look at title-deeds to see the amount of feu-duty where there was a total omission of them in the valuation roll.

*Adamson v. Smith* (No. 3, 17 Scot. Law Rep. 158) was a question of occupancy where the facts were both special and meagre. Again, in *Johnston v. Buchanan* (No. 8, 17 Scot. Law Rep. 163) it was held that there was no interruption of occupancy where a person had taken a house for a year from Whitsunday 1878, residing in it till September, and then going into lodgings for four weeks, after which he again occupied as tenant houses of sufficient value to qualify, while in the original house his furniture remained till May 1879, and his mother was herself resident till December 1878. One other case we find reported involving a question of occupancy, and that is *Loudon v. Brown* (No. 7, 17 Scot. Law Rep. 163). Lord Ormidale regarded even tenancy as not proved, but by the proprietor the claimant was returned as tenant and he stood on the valuation roll as such. The lease was in his favour, but against this there were the facts that his father guaranteed the rent and owned the furniture, and that he and his family resided in the house along with the claimant, who worked for his father, and drew what he wanted from the shop. The rent and taxes also were paid out of the same fund. We cannot think that the mere guarantee of the rent by the father should have made much difference, but the payments out of the shop-drawings and the other facts mentioned certainly had not the aspect of a tenancy and occupancy in the case of a son who was not a partner.

Somewhat akin to these questions of occupancy was the case of *Kennard v. Allan* (No. 10, 17 Scot. Law Rep. 165), in the burgh of Falkirk. The difficulty arose on the point of residence, which of course is requisite either within a burgh itself or a certain statutory radius of seven miles beyond its limits. Kennard had a house of his own in London, the house he claimed on was his only as a partner in a firm, and he visited his works at Falkirk from time to time on business and resided at this house when he did so. This constructive residence, however, was disallowed unanimously by the Court.

A somewhat mixed question was raised in *Cannon v. M'Keand* (No. 23, 17 Scot. Law Rep. 176), where a man was the occupant of a room which was not in the sense of the Act of 1868 a "dwelling-house." Accordingly he required to be separately rated for this, and as Lord Ormidale said: "I think we have the matter settled by the Reform Act of 1868. Separate rating is there made an indispensable condition of a dwelling-house. Now, this claimant

is not separately rated, and on that ground I think he is not entitled to be on the roll. The difficulty that is raised is this—it is stated that it was not the fault of the claimant that he had not been rated, but that it was owing to an omission on the part of the assessor. The assessor stated that he had omitted to enter the claimant on the valuation roll of 1878-79, and that in consequence of that the claimant was not assessed for poor-rates. It is urged that on this ground the objection of no separate rating falls to the ground, the fault having been committed by a public officer. But the 14th section of the Burgh Act, 1856, on which this is pleaded, scarcely applies to this case, for that clause only applies to 'claims or objections to claims.' It might become the interest of any person in such circumstances not to tender his rates as section 17 requires him to do, and the very object of the Act in making the payment of rates an essential to the enjoyment of the franchise would be defeated. The practical result of the decision is still further to strengthen the judgments in *Mitchell v. Arthur* (December 19, 1868, 7 Macph. 322), and in *Forbes v. Gordon* (December 19, 1868, 7 Macph. 320).

The claims and disputes as regards the Franchise Ecclesiastic have been numerous and exhaustive, but the year 1879 furnished one more decision on a yet unsettled point. In *Mitchell v. Halley* (No. 19, 17 Scot. Law Rep. 173) the Court affirming the judgment of the Sheriff made the induction of a minister the *punctum temporis* from which he could date the right to the franchise. The clergyman in question had been elected in July by vote of the communicants and adherents, but this appointment was not sustained by the presbytery, nor was he inducted till the month of August, so that the result of the decision was to postpone for another year his exercise of electoral rights. A somewhat curious case, with, however, an almost foregone conclusion, was that of *Davidson v. Cannon* (No. 26, 17 Scot. Law Rep. 179), where a person actually a pauper in receipt of parochial relief was placed on the register, since it appeared that within the twelve calendar months prior to 31st July immediately preceding he had not received such relief. Startling as the result is, there cannot be a doubt that under section 3 of the 1868 Act, were a sudden time of depression to come after 31st July, the gates of our poorhouses might in the event of an election be thrown open to let out the hordes of pauper electors, thronging to record at the poll their votes for the candidate to whom, according to their best judgment, support was due.

Two points, rather of practice than of law, turned up in the case of *M'Gowan v. Mather and Others* (No. 21, 17 Scot. Law Rep. 174). Mather was joint tenant with his father under a lease which provided that in the event of the tenants' bankruptcy it should be in the proprietor's power to terminate the contract. Mather did become bankrupt, and a trustee was appointed, who made no claim

for any interest in the lease. The landlord's factor after the bankruptcy returned Mather's father as sole tenant. The respondent was cited but did not appear. The Court did not, however, consider this non-appearance itself a sufficient reason for striking him off the roll, though the facts as stated were deemed sufficient to disqualify him. One of the judges said, "His non-appearance in answer to a citation on one occasion, with a promise to appear if the Court could be adjourned, is not sufficient in itself to strike him off the roll, but it is an adminicle of evidence." The other point of practice related to the effect of the 22nd section of the Reform Act of 1868 providing for the appending to a special case of a list of persons *claiming* whose qualifications depend upon the same question of law. Astonishing as it may seem, the Sheriff-Substitute here appended, and was permitted by the objector to do so without opposition, a list containing the names of two persons similarly *objected to*. We cannot do better than quote the words of Lord Ormidale, who sets forth fully the whole matter and his opinion upon it: "My impression—and it is a strong one—is, that it was against both the letter and the spirit of the statute to put these two men in the same position as William Mather, for I do not think section 22 of the 1868 Act applies to them. The words are, that the Sheriff shall append to the special case 'the names of all such persons who have appealed against his judgment, on their respective claims.' Now, these two voters were on the roll, and had no reason to suppose that they were to be bound up with this other man in a special case. They have not therefore appealed from the judgment of the Sheriff in their respective cases, and had no occasion to do so. It is difficult to see how the same circumstances can influence both their cases and that of William Mather."

In *Skeete v. Stewart* (No. 18, 17 Scot. Law Rep. 172) the question turned upon whether in point of fact an *ex facie* absolute disposition of property could be proved by parole evidence to have been merely a disposition in security for a debt. The disponent himself was ready to depone to the fact that he held the disposition merely in security, and he actually did so depone, the Sheriff having admitted the evidence. The Court however reversed this decision. "What has been done," said Lord Mure, "by the Sheriff is certainly contrary to the usual rule of law, that a valid title cannot be cut down by parole proof, for he has admitted such evidence." All the judges without exception referred to the case of *Jardine v. McCulloch* (Dec. 2, 1865, 4 Macph. 138) as a conclusive authority upon this matter. A reference had been made in the course of the argument to the application of the Trusts Act, 1696, to the present case, and the respondent pressed the case of *Stewart v. Sutherland* (7 Macph. 298) as an authority in his favour, but the Court were careful in delivering judgment to reserve all opinion as to the effect of that Act. It was pointed out that in the Registration Court there

must be some sort of connection between the owner and his property, not necessarily of a formal character, but at least in writing. Here of course the only writing was that under the claimant's own hand dissevering him from the qualifying subjects.

The Perthshire Registration Court also supplied a somewhat interesting case in *Skeete v. Buchanan* (No. 20, 17 Scot. Law Rep. 173). There Mr. Buchanan propelled in liferent to his eldest son, who was the next heir entitled under the entail to succeed, a portion of the entailed estate of Leny. The objection was taken that the subjects being held under the fetters of an entail, the deed being one of alienation was prohibited and of no avail. "But," observed Lord Ormidale, "it is well-established law that an entail proprietor is an unlimited fiar in all respects except where the deed under which he holds prohibits him from being such. In the present case there is set out by the Sheriff a quotation from the deed of entail, but after having read the whole case carefully I cannot find that in any part of it is it stated that the entailed proprietor is prohibited by the entail from doing what he has done in the present instance, and if there is not such prohibition the appeal must be dismissed." When, however, we turn to the opinion of Lord Mure, we find another ground for dismissal of the appeal, a ground to which Lord Ormidale makes reference, though without making it the basis of his judgment. Even assuming the alienation in question to have been properly struck at by the prohibitions contained in the clauses of the deed of entail, Lord Mure, by this assumption abandoning the ground taken by his brother judge, thought the appellant must be put out of Court. He said: "I find that so far back as the year 1760 it was decided that it was *jus tertii* for any one except an heir of entail to object to the granting of such a deed as this. That was settled in the case of *Campbell* (M. 7783), afterwards affirmed in the House of Lords. A similar judgment was pronounced in *Houston* in 1781 (M. 8794), and the question seems to have been considered as settled in the case of *Montgomerie v. Dalrymple* (March 2, 1813, F. C.). That being the state of the law at the date of the Reform Act, 1832, and nothing having since occurred to alter it, I am of opinion that the objection is not a good one, and that it is *jus tertii* for any one but an heir of entail to take it. The deed is in the present case granted by a father to his son; and in looking into *Connell* (p. 204), I find that the fact of the deed having been so granted has led to claims being more favourably entertained than when there has been a grant made in favour of a stranger." Although seemingly either of these grounds would suffice to dispose of the case, still it may have occurred to those who have attentively considered the case, that there might have been yet another ground on which the appellant's case could have probably been successfully opposed. That ground is based upon a consideration of the circumstances and consequences of this alienation. Be it observed, Mr. Buchanan alienated by propelling a portion of



the estate *in liferent only*, and further the alienation was in favour of the *next heir of entail*, his own son. Now supposing the son to have died before his father, the liferent would cease and the entailed estate would be reunited in the person of the father, from whom it would descend unimpaired in any degree to the heir succeeding, whoever that might be. Again, suppose the father died first, then the son would by the very deed of entail itself come into full possession, and the liferent would be extinguished *confusione*. We may thus almost say that even assuming, with Lord Mure, effectual prohibition against alienation, that there could be no ground for even an heir of entail to object, because there was no alienation in point of fact. The object of the prohibitory clauses of an entail is manifestly to secure that the estate shall pass down from heir to heir undiminished, and that object was in no degree frustrated by this conveyance executed by Mr. Buchanan. Just as fairly might it be called an alienation where an heir of entail in possession has to give up to his creditors the income of the estate during his life. The income of this portion was given up by Mr. Buchanan during his life to the person designated by the entail as his immediate successor, and in order to obviate any possible alienation of that portion in favour of a third party, the conceded right was limited to a liferent depending on the life of the next heir.

(*To be continued.*)

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## OVER-EXTENSIVE RATIONES DECIDENDI.

"WE are sometimes tempted to regret that our judges are so excessively prudent as they habitually show themselves to be. A beautiful point of law is raised in argument before them, one in which hundreds, and even thousands, of her Majesty's subjects are interested; and if they would but express an opinion upon it, their language would be generally accepted as a guide to future conduct. The attention of the Bar and of the public is directed to the discussion, and we are all waiting to know what the Bench will lay down. Too often we wait only to be disappointed. It is discovered that the dispute can be decided on the special facts of the case. Instead of the luminous judgment we had anticipated, enunciating and explaining general principles of law, which every man would apply to the circumstances of his own position, we are treated to a narrow examination of a particular case not likely to be repeated. We daresay the judges are wise in their determination not to go outside the facts of the dispute before them. No man, not even a Judge of Appeal, can see all around every question. Without the assistance of counsel to represent every possible interest, and to



find something to be said even for hopeless contentions, the most respected tribunal is liable to overlook some unsuspected aspect of the case. Experience has demonstrated the necessary imperfection of the best human intellects. The judges in the younger days of English jurisprudence occasionally took a wide scope, and made the decision of a particular case the means of establishing a body of law; but it is dangerous to imitate their daring, and we have learned the wisdom of taking one step at a time, and that the smallest."

We take these judicious observations from a recent leading article in the *Times*. We are not quite sure that it was only in the younger days of English jurisprudence that the judges "took a wide scope, and made the decision of a particular case the means of establishing a body of law." But in the general drift of the remarks we entirely concur. It is a perilous practice for a judge to indulge even in *obiter dicta*; in observations upon a case allied and akin to that which is before the Court, but not actually before the Court. "Such observations," says Mr. Trayner, in his book on Latin Legal Maxims, "have an authority commensurate with the reputation of the judge who makes them." It is a fair rider upon this remark to say that the reputation of a judge is in some degree affected by the mental affluence which induces him to make such observations. It is, however, a still more dangerous practice to lay down general principles not necessary to be laid down for the determination of the case—to use a case actually before the Court not simply and solely as a case to be adjudicated upon, but as a text to preach from—as a peg upon which to hang a piece of judicial legislation. The objections to doing so are these. The judge is travelling beyond his province if he takes upon himself the duty of promulgating a rule of law for the instruction of the lieges at large, instead of deciding upon the conflicting claims of two or more private individuals. And, secondly, the law so laid down is almost sure to be bad law; and the law so laid down hampers and embarrasses judges who have to decide future cases.

The practice to which we have adverted has been more common in England than in Scotland. It is more pernicious in England than in Scotland; because the English Courts have a greater, have even a superstitious, reverence for authority. A single decision, nay, the slightest scrap of authority culled from the opinion of a judge, has, as we have found in many cases, been regarded as a fetich, and received with the reverence that a Catholic devotee shows to a fragment of the true cross or a paring from the toe-nail of St. Peter.

The case which immediately suggested the above-quoted remarks in the *Times* was that of *Norton v. London and North-Western Railway Co.* (see 38 W. R. 173). The plaintiff was owner of a hotel erected in 1861 close to the railway line. Eighteen years afterwards, obviously with the view of preventing the plaintiff

acquiring an easement of light and air, which, according to English law, he would have done in twenty years, the railway company erected a hoarding. The case suggested the large and general question whether a railway company has the same complete right of property that an ordinary proprietor has, or whether they have right to their lands only for railway purposes, just as turnpike trustees have only a restricted right to the land over which the highway runs. Even supposing the railway company had only a right for railway purposes, it would not follow that they were not entitled to prevent a neighbouring proprietor from acquiring an easement of light and air; because it is difficult to say what railway purposes are. The railway purposes of one year are not the railway purposes of another year. In a very short time the railway company might require to make an alteration which a right of access to light and air might prevent them making. They might choose to vary or extend the area of their line, erect a new station, or a pointsman's box, or a surfaceman's cabin.

Malins, V.C., held that railway companies were not in the same position as ordinary proprietors; that they held the land merely for railway purposes, and on that ground gave judgment in favour of the plaintiff. There was another ground on which he gave judgment to the same effect, viz. that the strip of land on which the railway company's hoarding was erected was the property, not of the railway company, but of the plaintiff. One would have thought that was a sufficient ground of decision, and that there was no necessity of going so far afield as to consider the proprietary rights of railway companies generally. The Court of Appeal took this matter-of-fact view of the case, and while affirming the judgment of the Vice-Chancellor upon the minor and particular question, declined to give any opinion on the larger and general question—"the hypothetical case," as Lord Justice James designated it, which "was in fact the main subject of argument both in the Court below and here." After stating the propositions in law which had been thus somewhat ultroneously submitted, Lord Justice James added, "We do not think it necessary or desirable that we should in this case determine any of the abstract propositions of law above shadowed forth. . . . We propose, therefore, to leave the determination of those questions to a future time and occasion, if and when it becomes necessary to determine them, and when it shall be more clearly seen whether there is any practical possibility of the easements doing the company any possible harm. . . . We propose, therefore, to relieve the plaintiff, who has had sufficient litigation already, from the necessity of contesting further in this case the grave general questions of law which have not yet arisen in fact." A question as to the right of possession of a small strip of territory has been often the occasion of determining large questions of cardinal importance in European politics. The Lord Justices of Appeal did not think a case which might be decided by

determining the right of possession to a small strip of waste land a suitable one for trying the question of the proprietary rights of railway companies, in which there would be a hotel-keeper on the one side and practically all the railway companies in the kingdom on the other side. When we find an English judge who has got a case before him which may be decided by determining a quotidian question of possessory right, treating it as a windfall which gives him the occasion of settling questions of vast public importance, we are not surprised that the English judges complain of being, unlike their Scottish brethren, overburdened with work.

Of the evil consequences which result from the practice of treating of questions not before the Court, of laying down general principles which may be suggested by the case, but which are not necessarily involved in it, and are not necessary for its determination—principles which entirely overlap the point to be decided—we find a striking illustration in the case as to offer and acceptance by post recently commented on in this Journal (xxiii. 617). In that case (*Household Carriage Co. v. Grant*, 48 L. J. Rep. Ex. 577) it was held that a contract was completed by the mere posting of the acceptance, although it never reached the offerer. The principle on which this monstrous decision was supported was this, that by sending an offer by post, the offerer not only invited the offeree to respond by the same medium of communication, but that he constituted the post office the common agent of the parties. As a matter of fact we know that the post office is not in such a case the common agent of the parties. To be agent first for one person in carrying a letter, and then agent for another person in carrying a letter in reply, is a very different thing from being common agent for both. It seems as if the majority of the judges in the *Household Carriage Co.'s* case, in seeking for a principle with which to support their decision, had floundered upon a phrase. It is clear that the theory of common agency is not only not founded on fact, but that if carried out to its inevitable logical conclusion, it would lead to results which, besides being negatived by everybody's common sense, are negatived by the authority of decisions previously pronounced. If the mere posting of the letter of acceptance, the putting it into the hands of the alleged common agent, completed the contract, it would follow that if the acceptor "rued his bargain" and posted a letter of recall five minutes after he posted the letter of acceptance, and both letters went by the same post and were delivered at the same time, still the contract would be complete. This result is absurd, and it is in the teeth of the decision in the case of *Alexander v. Countess of Dunmore* (15th Dec. 1830, 9 S. 190). Again, suppose the offer, though posted, never reached the offeree, who, however, happened to know of it *aliunde*, he would be entitled to accept by putting a letter of acceptance in the post office, which the offerer had, by posting his offer, constituted his agent. Suppose that not only did the offer not reach the

offeree, but that the acceptance never reached the offerer, the contract would be complete, both letters having been put in the hands of the common agent. Nobody except the English Lord Justices will be inclined to hold a contract completed by an offer which never reaches the offeree and an acceptance which never reaches the offerer. Yet this conclusion follows inevitably from the principles laid down in the *Household Carriage Co.'s* case.

How were the majority of the Court of Appeal in this case seduced into propounding such a monstrous doctrine? Simply by the influence of the authority of Lord Cottenham, who, in the case of *Dunlop v. Higgins* (9 D. 1407, 6 Bell's App. 195), laid down principles not necessary for the decision of that case, but which were applicable to other cases, and which the English judges have thought it incumbent upon them to apply. In *Dunlop's* case the decision arrived at might have been arrived at on the ground that considering the usage of trade and the invitation of the offerer to reply by return of post, the offer had been timeously accepted, and the acceptance had been timeously received by the offerer. This was all the length that the Court of Session went. But Lord Cottenham thought proper to go farther. He clearly indicated that he regarded the post office as the common agent of both parties, and he cited the case of a letter containing a notice of dishonour of a bill never reaching its destination as one on all fours with the case before him, although it is quite clear that such a case is entirely inapplicable and depends upon an entirely different principle. "Whether," said his Lordship, "that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." The view of Lord Cottenham has been regarded and sanctioned in later cases to which it was applicable, and its authority has been held binding even by judges who confessed that it was unnecessary for the decision in the case in which it was put forward. In *Harris's* case (L. R. 7 Ch. 587) Lord Justice James referred to *Dunlop v. Higgins* as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment, in which he arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract, that is to say, the moment one man has made the offer and the other has done something binding himself to that offer, then the contract is complete, the instant of completion being that in which the letter accepting the offer is delivered to the post, and neither party can afterwards escape from it." Similar views as to the import of *Dunlop v. Higgins* have been pronounced in *Hebb's* case (4 L. R. Eq. 9) and *Duncan v. Topham* (10 L. J. Rep. Ex. 227). And in this case of the *Household Carriage Co.* Lord Justice Thesiger has said: "Lopes, J., has decided that the defendant is liable as a dealer. He based his decision mainly upon the ground that

the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court. *Dunlop v. Higgins* is of course the leading case on the subject. It is true that Lord Cottenham might have decided that case without deciding the point in this. But it appears to me equally true that he did not do so, and that he preferred to rest, and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, *this Court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the exact decision itself.* . . . In short, Lord Cottenham appears to me to have held that, as a rule, a contract by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered."

When Lord Romilly in *Hebb's* case, and Lord Justices James and Mellish in *Harris's* case, sanctioned the view first put forward by Lord Cottenham, we are not surprised that Lord Justice Thesiger as well as Mr. Justice Lopes thought themselves bound to follow it in the *Household Carriage Co.'s* case. But one is tempted to ask, if the principles laid down by Lord Cottenham were not necessary for the decision of the case, why did he lay them down? And if principles not necessary for the decision of a case are to be held binding in future cases, surely this is the strongest of all possible reasons why judges in the House of Lords or elsewhere should take care not to do so again. It does not, however, appear quite settled that such *rationes decidendi* are binding. There is a dispute among the learned upon this subject. A different view from that of Lord Justice Thesiger has been taken by eminent judges even in regard to the decisions of Lord Cottenham. In the case of the *Mersey Docks Commissioners v. Gibb* (11 H. of L. Cases, 686) reference was made to another Scottish appeal case in which Lord Cottenham gave judgment. The English judges were consulted, and in the opinion given by them it is said with reference to *Duncan v. Findlater* (1 Rob. 911): "But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment, who were not shown to be their servants, it is not to be disputed that Lord Cottenham's language goes a great deal further, and shows that in his opinion persons incorporated for the purpose of executing works could never, in their official or corporate capacity, be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. . . . This is no doubt a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scottish case; but not being the point decided by the House it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the



preponderance of authority." In the same case Lord Westbury said he thought it "desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater*. . . . The learned judges observed, and with very great correctness, that it is not everything that falls from a noble and learned Lord in advising the House which is to be considered as the opinion of the House. Those observations of Lord Cottenham, which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done—would, if they were recognised as law, undoubtedly lead to very great evil and injury."

In this relation, some remarks of a similar kind by Mr. Justice (now Lord) Blackburn in the case of *Harris v. Great Western Railway Co.* (L. R. 1 Q. B. Div. 515), one of the "cloak-room" cases, are worthy of note. The question in that case was whether the plaintiff was bound by the conditions on a ticket he had received on depositing some luggage at the station, and reference was made to the case of *Henderson v. Stevenson* (2 Rettie, H. L. 71), a case entirely different indeed, because the responsibility of railway companies as carriers is one thing, and their responsibility as warehousemen is another thing, but in which observations were made by Lords Chelmsford and Hatherley as to whether a ticket formed any part of the contract. "Some of the observations," said Mr. Justice Blackburn, "made by the judges in *Henderson v. Stevenson* are to be treated with great respect as authorities, but are not binding upon the House itself on a future occasion, or on any other Court. We are bound to follow it as a decision; but this is only true so far as the decision or rather the *ratio decidendi* of the House goes."

We are disposed to agree with Lord Justice Thesiger in the view which he has taken of the manner in which one ought to regard the *ratio decidendi* of a case. It seems to us that so far as the matter of precedent is concerned, it does not much matter that another principle, a principle of less general application, or even a particular circumstance in the case, might have sufficed for the determination of the case. When we look to a case for guidance in future cases, it is not the particular decision, it is the ground of decision, which is of value and importance; and although another reason might have been assigned, the principle which *has* been laid down is the principle all the same. When we have so often to "boil down" cases, to subject a case almost to a chemical analysis in order to elicit a principle, it would be hard to reject a principle explicitly promulgated.



## THE LAW OF LIBEL AND SLANDER IN ENGLAND.

THE faculty of saying nasty things neatly is one of the most precious possessions of the human mind. Any reader of *Mémoires* and *Ana* knows that there are many people who have acquired a place and influence in society, and even an historical importance, the reason of whose success one would vainly seek for in any other source than the possession of this gift. It is not every one who can say nasty things neatly; and it is not every one even who is able to say them safely. The books are full of illustrations of this, and of the pitfalls into which inexperienced and unwary satirists may tumble. Among the handbooks of law for popular use with which we have been inundated of late years, we have not come across any one for the guidance of the public in the art of slander, telling us what nasty things you may say of your neighbour safely, and what nasty things you may not, and what expressions which may be used without money and without price on one side of the Tweed become expensive as soon as you cross the boundary. In England, to say that a man is a blackguard is not actionable (*Addison on Torts*, 3rd edition, 789); in the Scottish case of *Brownlie v. Thomson* (Feb. 11, 1859, 21 D. 480) it was held that it was. In *Jameson v. Bonthron* (June 13, 1873, 11 Macp. 703), the expression "d——d puppy" was held not to be actionable, even when used in open court to a person who in his pleadings described himself as "holding the honourable and exalted position of procurator-fiscal of Auchtermuchty." The lay mind must be greatly exercised on reading these nice distinctions, and we commend the subject to the attention of some of the great unemployed. It is one which presents "an opening." A book of the kind we have indicated, under some such title as "The Slanderer's Vade Mecum," or "The Libeller's Complete Letter Writer," would immediately be hailed as supplying "a felt want," and would be of great assistance to many persons in selecting their epithets. The present is a peculiarly opportune moment for compiling such a treatise. A general election is impending. That is a time at which there is an irresistible tendency to overstep the prudence of debate, and it is also a time when an imputation which would not produce the slightest effect on the mind of any mortal man on any other occasion, may have most important effects—may imperil a candidature, or even turn an election. A book of this sort published at present would be sure to sell. It would be criticised in the usual fashion: "This is a work without which no gentleman's library is complete;" "We cordially commend this interesting and instructive treatise to the attention of candidates, agents, chairmen and members of committees, canvassers, bill-stickers, and all others interested in election matters;" "This is a manual which every editor or writer of leading articles should constantly have at his elbow;" and all

the rest of it. For the sake of condensation, as well as for facility of reference, the book might be prepared in a tabulated form, thus :—

<i>Safe.</i>	<i>Dangerous.</i>
Rogue (when spoken).	Rogue (when written).
Damned puppy.	Blackguard.
Drunk in church (of a clergyman who has not got a living).	Drunk in church (of a clergyman who has got a living).
Blackleg.	Master of unseaworthy ship ( <i>Ingram v. Lawson</i> , 8 Scott, 471).
Infernal villain.	Wesleyan.

In considering what expressions are or are not actionable, the writer of such a manual would require to keep in view the distinction between the law of England and the law of Scotland. In Scotland defamatory words, whether written or spoken, if they lower the character or hurt the feelings of the person with reference to whom they are used, are actionable. In England words of that kind, if merely spoken, are not actionable without proof of special damage. Thus, you may impute unchastity to the most pure and innocent woman, in the most open and public manner, and in the coarsest terms, with impunity, if no special damage can be shown, as, *e. g.*, by showing that the imputation had prevented an intended marriage. Then the law of England recognises a most material distinction, as to their consequences, between libel and slander. "A libel," says Mr. Justice Gould, "is punishable both criminally and by action, when merely speaking the words would not be punishable in either way." Thus, you may with impunity say that a man is "a rogue," "a rascal," "a low fellow," "a disgrace to the town," "a consorter with prostitutes," "unfit for decent society," "a scoundrel," "a swindler," "a blackguard," "an itchy old toad," "a man of straw," "an infernal villain," "a blackleg" (where it is not made out that it was intended to represent the person as a cheating gambler), or that a lady is "a notorious liar," "an infamous wretch," that she "gets her living by prostitution," unless special damage is shown; but these become libellous if written or printed and circulated. The reason why expressions are punishable if circulated in print is given by Mr. Addison in his book on Torts (3rd edition, p. 766): "Before a person gives general circulation to a calumny by circulating it in print, he must be prepared to prove it is true to the letter; for he has no more right to take away the character of the plaintiff without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. 'Indeed,' observes Best, C.-J., 'if we reflect on the degree of suffering caused by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter.'" The *ratio* given for punishing libel is very good, although not very new. "Who steals my purse

steals trash," etc. is a not unfamiliar quotation. But one cannot help asking, Does not the same reason apply in the case of slander? And if a distinction is to be made between the two cases, it may be remarked that there are many instances which may be supposed where the justice of the case would be met by reversing the rule. Infinite pain may be caused by a defamatory report orally circulated among one's friends and the members of one's family, which, if printed in some obscure or some disreputable print, would cause no pain at all, and might probably never come within the cognizance of the person whose character was assailed, or that of any person whose opinion he regarded.

In regard to the question of what amounts to special damage, the English cases are full of curious distinctions. Special damage seems to be presumed where defamatory words are used in the case of a professional man or man in business—his character being part of his stock-in-trade. But the words must, to involve damages, be shown to be used in connection with the profession or business of the individual assailed. To call a solicitor "a lying cheat" is not actionable *per se*; but to say that he cheats his clients is. To say that a beneficed clergyman has been drunk in church, or to attribute incontinence to him, is actionable *per se*, as such statements tend to injure him professionally, and might lead to degradation of orders, and consequent loss of temporal emoluments. It is otherwise in the case of a clergyman who is not beneficed, and is not in the actual receipt of professional emoluments as a preacher, lecturer, and so on. It seems to us that if there is to be a distinction, it ought to be the other way. A slander does more harm to a non-beneficed than to a beneficed clergyman. The latter can afford to laugh at it; the former may not. A mere defamatory report will not very readily deprive a clergyman of his office, but it may very readily prevent him from getting one. Again, it has been held that loss by a married woman of the hospitality of friends is sufficient temporal damage to sustain an action; but the mere loss of her husband's society and conjugal attentions is not. In regard to the latter point a distinction has been drawn. If the slanderous words amount to a charge of adultery, in consequence of which the husband has left her, they are actionable. One would have thought, in the absence of authority, that the damage was to be estimated by the effects of the charge made, not by the nature of it.

Words are held actionable *per se* which impute a crime. Even the charge of keeping a house of ill fame has been held actionable *per se* (*Brayne v. Cooper*, 5 M. & W. 250), although a charge of gaining a living by prostitution has been held not actionable *per se* (*Wilby v. Elston*, 8 C. B. 142). In looking over the decisions it is interesting to notice the ebb and flow of judicial opinion on the subject of defamatory words. At one time we find the judges running upon the idea that actions for slander ought to be encouraged, or at least that defamatory expressions should be

regarded with severity, because there is nothing which should be more protected than a man's reputation; at others we find them disposed to pooh-pooh all such actions, as tending to foster the ill-feeling which, if left to itself, would die away.

It need hardly be said that in looking over the decisions there are many odd and droll cases. One of the most singular is the case mentioned in *Crawford v. Middleton* (1 Leving, 82), where the plaintiff brought an action for slander against a person who said that the plaintiff had been hanged. The plaintiff did not like such a statement being made about him, although he was convinced in his own mind that there was no truth in the charge; and so he brought his action. The defendant does not appear to have pled *veritas convicii*, his defence being simply that he had repeated a story which he heard in grief and sorrow at the news; and the Court on this ground nonsuited the plaintiff. Indeed we think the defendant, so far from being liable in damages, ought to have had compensation from somebody or other, having been defrauded of his tears, which might have been more usefully expended.

Our attention has been drawn to the present subject by the case of *Botterill v. Whytehead* (41 Law Times Reports, 588), recently decided in the Exchequer Division. The case was this. A parish church near Hull was about to be restored, and seeing that it was built in the fourteenth century we should fancy it would not be without the need of repair. A committee was appointed to look after the work of restoration, and they engaged Mr. Botterill, an architect, to prepare plans. Mr. Whytehead, the defendant, the clergyman of an adjoining parish, hearing of this, wrote a letter to one of the committee, in which he said he had learned that the restoration "has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" In another letter to another member of the committee, he said, "Are you aware that the Messrs. Botterill are Wesleyans, and cannot have any religious acquaintance with such work?" The architect, thinking this an imputation on his professional character which might prove injurious to him professionally, brought an action for libel. The jury awarded £50 of damages, and the Exchequer Division has sustained and approved of the verdict.

The defendant pleaded privilege and justification. The latter plea, the Court said, was a "timid justification," for in his pleadings the defendant said as to the charge of the architect not being able to show any experience in church work (meaning by that, of course, work of the kind in question, viz. restoration of ancient churches) he meant no such experience as, "in his opinion," was requisite. We do not see that this was a "timid justification" at all; when

the writer of a letter expresses an opinion about anybody's qualifications, it is his own opinion that he is expressing. The accusation, if it be one, was that the architect was a Wesleyan, and could show no experience in church work of the kind in question, viz. the restoration of ancient churches. It turned out that the architect was a Wesleyan, and that he had no experience in church restoration. He had experience in building Wesleyan chapels and schools; but as for church restoration, all he could show was that he had repaired the roof of a church which was stated to be, not an ancient church, but a poor specimen of modern Gothic.

In giving judgment, the Lord Chief Baron said to impute to an architect employed in the restoration of an ancient church that he has no experience in the work in which he has been employed was in itself a libel upon the architect in the way of his calling or profession; to describe him as a Wesleyan, added to the injurious character of the letter; and further, that to write of an architect that by acting in the work in question the masonry of an ancient gem of art will be ignorantly tampered with, was in itself libellous.

It seems to us that the defendant has been hardly treated, and we are tolerably sure that in Scotland we should have thrown cold water on the case. The remarks seem quite within the limits of fair criticism. As regards the question of privilege, we do not think it was a matter of privilege any more than any other fair criticism on a matter in which the defendant has a legitimate right to take an interest is privileged. It cannot be said that the writer of the letter had no occasion to make any observation upon the subject. The Lord Chief Baron said the defendant was not the patron of the living nor minister of the parish the church of which was to be restored, nor even a parishioner. But the matter was one of public interest, and one of special interest to the defendant, who was a clergyman of the Church of England, a member of an archæological society, the vicar of an adjoining parish, and had been born and had lived for some years in the parish where the work of restoration was to go on. Further, to take a broader view, when we consider that the whole tendency of opinion is to encourage a feeling in favour of art, it would surely be hard if people were to be deprived of the liberty of expressing their sentiments on the subject.

According to the Lord Chief Baron, the worst thing in the letter is the calling the architect a Wesleyan. His Lordship mentions the horrible circumstance more than once. "If any doubt could be entertained as to the libellous character of the letter, the wanton and irrelevant statement that the plaintiff was a Wesleyan" would put an end to the doubt. If it were to be held as settled law that a person is liable in damages for calling a man a Wesleyan, one might, when in a sportive vein, construct a graduated table of fines for calling a man by the name of any of the thousand and one

sects, denominations, and religious parties with which this country abounds. If you have to pay £50 for calling a man a Wesleyan, what would you have to pay for calling him a Unitarian, or an Anabaptist, or a Glassite, or a Swedenborgian, or a Plymouth Brother, or a Christadelphian, a Mormon or a Moravian, an Erastian or an Arian, a Pelagian or an Archipelagian? Of course there is in itself no harm in calling a man a Wesleyan. "Wesleyans are rather good sort of people, aren't they?" says a lady of rank in one of Lord Beaconsfield's novels. But the innuendo undoubtedly was that, being a Wesleyan, the architect was not suitable for the work in hand. We cannot see that this statement was wanton or irrelevant. The Wesleyans have not been particularly distinguished for their devotion to ecclesiastical art. "Little Bethel" is not a splendid specimen of a sacred edifice. The Wesleyans have set themselves in a *prononcé* manner against all high church sentiments, all mediæval tendencies, and generally against the æsthetic side of religion. A person imbued with Wesleyan beliefs and sentiments would, it might reasonably be supposed, have little sympathy with the spirit of those pious artists of the ages of faith whose sentiments of religion and of art found expression in those "ancient gems of art" one of which this architect was employed to restore. And if there is anything in the art creed of the great art teacher of this time, the defendant was right. When David Deans objected to one advocate suggested to him as a proper person to be intrusted with his daughter's defence that he was an Arminian, to another that he was a Cocceian, to a third that he was "onything you like," to a fourth that "he was naething ava'," the objection was absurd, because a counsel's religious opinions, or his want of them, have no bearing on the question of his skill in making a defence. But the case before us was quite a different case. It cannot be said that the religious sentiments and associations of the person selected to do the work and the work itself, were without relation to each other.

Suppose the case had been just the other way. Suppose the late Mr. Pugin, who it is well known was a Roman Catholic, had been selected to build a Quaker meeting-house or a Presbyterian church in Ulster, a Quaker or an Orangeman might very reasonably have questioned the propriety of the selection.

As to the matter of having experience in church restoration, it was quite true that the plaintiff had not such experience. What experience he had was of a kind that tended not to fit him, but rather to unfit him, for the work in hand. We cannot see that there was in the allegation any imputation upon the architect's general professional skill. The work to be done was the work of a specialist; and to say that a man is not a specialist does not detract from his general reputation. There are architects and architects, as there are painters and painters, actors and actors. It would surely be no imputation on Mr. Toole to say that he is not



a good man to take the part of Hamlet. If a subscription were got up to have a portrait of the Prince of Wales, it would surely not be libellous to write to a member of the committee saying that they had better not employ Waller Paton.

In regard to the general import of the letter, we cannot think it amounted to a charge of professional incompetence, or even of incompetence for the particular work. It seems rather to sound a note of caution and warning. The import seems to be this. This is a work which, if ill done, will cause an injury which can never be repaired, and therefore do not run any risk you can avoid. It was not the case of building a new church, which, if it proved a failure, could be pulled down again, and no harm done except the loss of a deal of money. It was an "ancient gem of art," which, if ignorantly tampered with, would be destroyed for ever. Suppose you are a china-maniac, and a friend gets a rare Wedgewood tea-cup fractured. He sends it to a tinsmith to be mended. You say to him, "This man may do very well for putting a tin clasp on a broken piece of delf, and it is possible he may be skilled in repairing such an ancient gem as this, but his previous experience gives no guarantee that he is so skilled, and his previous experience affords a presumption that he is not; it would be risky to intrust him with the job, which, if ill executed, will spoil your 'gem' altogether." Would such a statement be libellous? Would it impute anything against the general skill of the artificer? Or suppose a "Turner" were in need of restoration, as "Turners" generally are, you might surely dissuade anybody from intrusting the task to one who was a portrait painter, and who had never restored a picture in his life.

There are not a few persons in Scotland who would not be unwilling to see our Scottish Courts abolished, and their jurisdiction transferred to Westminster. They had better take care. We do not think that any one who reads the foregoing illustrations of the English law of libel will be inclined to regard any such alteration as productive of advantage so far as cases of libel are concerned. In this matter neither the principles nor the practice of English law are as sound as our own. If such a transfer should be made less justice would be done, the glorious uncertainty of the law would be increased; and if this case of *Botterill* is any criterion, there would be less freedom of speech, and irksome restraint would be put on what we are accustomed to regard as fair criticism. In England it seems that you dare not call a man a Wesleyan, although he is a mere architect; while in Scotland you may call a man a d——d puppy, even though he holds "the honourable and exalted office of procurator-fiscal of Auchtermuchty."

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## Obituary.

MR. DONALD ROBERTSON, Depute-Clerk of Session, one of the oldest and most respected of our Parliament House community, has been cut off from amongst us since our last issue. Hale and robust-looking, with tread as firm and step as elastic as ever, he walked up the Mound on Tuesday the 17th February, and engaged thereafter in his work in Lord Rutherford Clark's Court at the accustomed hour. No one noticed aught amiss, when in a moment—while writing an interlocutor, it is said—he passed quietly away. His head was seen to incline forward, a slight choking sound was for a few seconds audible, and all was over. So far as we know, he had not been ailing previously, and his end was altogether without warning. He was seventy-three years of age.

Mr. Robertson will be mourned and missed. Not that he was a public man. He will be mourned because every one liked him ; he will be missed for he belonged to a type of which there are few left. No face was more familiar for many a year past on the boards of the old Hall. To those of our readers who can look back a little his name is best known as associated with that of his old chief and patron, the late Lord Colonsay. Coming to Edinburgh in 1827, Mr. Robertson was apprenticed to a firm of Writers to the Signet, but he never joined any of the legal bodies. He became Duncan M'Neill's clerk, when such a post was very different from what it is now. He was more than clerk, he was his secretary rather, and his lifelong companion.

It was not till 1867 that Mr. Robertson became a Depute-Clerk of Session. In that position all who engaged in business of any extent in the Supreme Courts necessarily came in contact with him, and no one ever said a word against him. Mr. Robertson's massive figure always caught the eye. But it was not his figure only which attracted. Many also knew his sterling qualities. There was a charm about him which those who were privileged to know him well will not soon forget. Genial as many are, there was an instinctive heartiness in his welcome which never failed him. There was always a humour about him which made him one of the pleasantest of companions. We have heard it said that he would frequently offer a kindly word of encouragement or advice, always unobtrusively, to the young advocate who had pleaded his first cause. The sympathy his sudden death has called forth is universal. We are only concerned with Mr. Robertson as a figure in Edinburgh legal circles. His friends about his Highland home on the shores of Loch Scriden can be trusted to pay him their tribute. Two of his brothers were Sheriff-Substitutes, the one of Tobermory and the other of Orkney, and his only son has now been for some years in practice at the bar.

ALEXANDER M'NEIL-CAIRD, Esq. of Genoch, near Stranraer, died

at his residence on the 14th ult. He was one of the vice-presidents of the Chamber of Agriculture, and latterly devoted much time to agricultural affairs. He was admitted a Procurator in 1835, and was made Procurator-Fiscal of Wigtonshire about 1838. He was also Provost of Stranraer from 1852 till 1858.

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### The Month.

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*What Glasgow thinks of the Court of Session.*—In an able notice of the second volume of Mr. Mackay's "Practice of the Court of Session" in the *Glasgow News* of the 9th ult., the following remarks occur:—"It is with strong approval we mark the author's unflinching confidence in the future of the Court of whose course of procedure he is the historian. No Scotchman who has any pride in one of the too few surviving distinctive institutions of his country can listen with patience to the foreboding croakers who discover the decay and predict the downfall of the Court of Session; and no man of discernment can assent to the justness of their views. It is, unfortunately, too true that the amount of the business in the Court of Session is not what it ought to be, and what the capacities of the Bench and Bar deserve. But there is, we apprehend, scarcely any period in the annals of the College of Justice when it comprised an abler Bench or an abler Bar than at present. In the recent trial of the Bank directors, perhaps the only point on which society can look back with satisfaction is the forensic talent which it evoked. And as regards the junior Bar, we are confident it never at any time was characterized by more ability and more scholarly and thorough training than it is now. This in itself ought to augur well for the future of the Court of Session, and consequently for the country. But, on the other hand, it is impossible not to see that, till within the last few years, the policy of the administrators of Scottish legal matters has been to divorce the country from the Court as much as possible. We point our readers to Mr. Mackay's chapter on Appeals, and shudder to notice how many are the obstacles, not the facilities, to litigants in their efforts to get the services of the Court for whose maintenance they are taxed. When we think of the immense mass, and the frequent difficulty and importance, of cases that have to be brought in the Small-Debt Courts, and in regard to which all review is as jealously excluded as from the secrets of the confessional—when it is remembered that in the rural tribunals of Scotland probably one-third of the cases are below the appellate limit—one is led to fancy that the Supreme Civil Court of Scotland, as a Court of Appeal, must be constituted on the *lucus a non lucendo* principle, and to envy the lieges of England and Continental countries. In the existence of

the Sheriffs is to be found undoubtedly one dire barrier to the close connection of the Supreme Court and the country; while the trades-union policy which excludes the Sheriffs of Mid-Lothian and Lanarkshire, and all the Sheriffs-Substitute of Scotland, from the possibility of promotion to the Supreme Bench, is an injustice alike to the country and to them. The great desideratum, however, as it strikes us, in the Court of Session procedure, and the point in which the Sheriff Court has so much the advantage of it, is—elasticity. The one Court displays a rigid subservience to rule and precedent in matters of this kind which vividly contrasts with that which characterizes the other, and which leads, every now and then, to a protest or a dissent by some one or other of the more enlightened Senators of the Judicial College. Take as example Mr. Mackay's chapter on Proofs before Answer. The author premises that "although it has been said that the meaning of the words 'proof before answer' is perfectly settled in the practice of the last two hundred years, few questions of practice have been more often raised in recent times than their correct use." Mr. Mackay, with patient industry, tries to reconcile the scarcely reconcilable decisions that have been pronounced on this point. We can only express our hope that his intelligent statement may lead to some authoritative and consistent judgment on this *vexata quæstio*. A similar deliverance on the matter of competency in multiplepointings is to be desired—inspired, we trust, by the idea that for the sake of the country, and, above all, of the unhappy holders of the disputed fund, it is expedient that as many cases as possible should be admitted, and not, as heretofore, be shut out.

WE are glad to learn that the Government has purchased the premises in Parliament Square recently occupied by the Union Bank. We hope the Courts will reap some benefit from this purchase. The Government is now, as they ought to be, in possession of all the buildings in Parliament Square.

*Appointments.*—NORMAN MACPHERSON, Esq., Advocate, LL.D., has been appointed Sheriff of Dumfriesshire and Galloway, in room of the late Mr. Mark Napier. Mr. Macpherson was called to the Bar in 1851, and has frequently been called on to fill important though temporary appointments, such as secretaryships and chairmanships of Royal Commissions and such-like. In 1865 he was elected by the Faculty of Advocates Professor of Scots Law in the University of Edinburgh, the duties of which he still continues to discharge. Without for a moment underrating the claims Mr. Macpherson has to promotion, we cannot but express our regret that any member of our Bar should continue to hold at the same time two such lucrative offices as that of Sheriff of a county and Professor of Scots Law. The prizes in the profession are daily becoming fewer and fewer, and we do not think it a good precedent that the same gentleman should hold two such important appointments. We feel it our

duty, in the interests of the profession, to make these remarks, but in doing so it must not be supposed that we intend anything personal to the learned sheriff, whose geniality of disposition has endeared him to many friends, and whose abilities as a professor are too well known to require any comment.

We regret extremely to learn that the salary of the above Sheriffship has been reduced from £900 to £500. It is difficult to find any reason for this having been done, except that it appears an almost invariable rule now that the emoluments of such offices are to be reduced. We can hardly blame the Government for acting in this manner when we find that the great aim of the majority of Scottish members of Parliament seems to be to curtail to the utmost possible extent the expenditure of public money on Scotland. We have frequently referred to this extraordinary disposition on the part of our members, and have never been quite able to account for it in a satisfactory way. Had such a case as the present occurred in Ireland, we are afraid the Chancellor of the Exchequer and the Home Secretary would have spent many a *mauvais quart-d'heure* at the hands of indignant members of the "oppressed country." The present instance seems to us to be about the most unsuitable that could have been selected for the purposes of economy. The Sheriffship is one of the largest in the country, and the means of communication are neither easy nor cheap. When we think of what the learned Sheriff will have to do, and the attendances he will have to give at Courts in the various parts of the counties over which he has jurisdiction, we have no hesitation in saying that he will require to spend about a third of his income in travelling expenses alone. And this is the Sheriffship the salary of which has been reduced to an amount considerably below that of a Clerk of Court.

HECTOR WILLIAM MACLEOD, Esq., M.A., Advocate (1878), has been appointed a Puisne Judge of the Supreme Court of the Gold Coast Colony.

WE believe that GEORGE SMYTHE DUNDAS, Esq., Advocate (1867), has been appointed Sheriff-Substitute at Campbeltown.

ANDREW MURE, Esq., M.A., Advocate (1853), has been appointed a Puisne Judge in the Colony of the Mauritius.

THE following is the Bill-Chamber Roster for the ensuing vacation :—

Monday, March 22, to Saturday, April 23—Lord SHAND.

„ April 5, to „ April 17 „ RUTHERFURD-CLARK.

„ April 19, to „ May 1 „ CURRIEHILL.

„ May 2, to meeting of Court „ ORMIDALE.

The Court of Session will rise on Saturday the 20th of March for the Spring vacation.

# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF ZETLAND.

Sheriff RAMPINI.

JOHNSTONS v. NORTH OF SCOTLAND STEAM NAVIGATION COMPANY.

*Passengers' luggage—Contract to deliver—Obligation of shipping company.*—Circumstances where held that a passenger from Lerwick to Granton, who at Granton got the steward to readdress his luggage to Edinburgh, and left it with the steward to be put on one of the company's lorries for carriage to and delivery in Edinburgh, where the charge for carriage would be paid, was, on failure to deliver, entitled to decree for the value of such luggage.

The facts in more detail are stated in the interlocutor of Sheriff-Substitute Rampini, and relative note, which are as follows :—

“*Lerwick, 13th December 1879.*—The Sheriff-Substitute having heard parties' procurators, made avizandum, and considered the closed record, proof, productions, and whole process, Finds in point of fact—(1) that the pursuers, Adolphe Michael Levy Johnston and Mrs. Helen Urquhart or Johnston, were passengers on board the defenders' steamship *St. Clair* on its voyage from Lerwick to Granton on the 24th, 25th, and 26th March last; (2) that the trunk, with the contents specified in the list attached to the petitions, formed part of the pursuers' luggage as passengers, and was received on board at Lerwick and put into the hold by the defenders' servants; (3) that shortly before arriving at Granton the trunk was seen on the deck of the said steamship *St. Clair*, and that it was then handed over by the said Mrs. Johnston to Robert Henderson, the steward of the said ship, to be sent up by the defenders' lorries to Edinburgh; (4) that the said trunk with its contents have not been received by the said Adolphe Michael Levy Johnston and Mrs. Helen Urquhart or Johnston; (5) that the amounts claimed for the trunk and for the articles contained therein are the fair and legitimate value of the same; (6) that the defenders are common carriers between Lerwick and Granton; (7) that the defenders run lorries between Granton and Edinburgh for the carriage *inter alia* of passengers' luggage, and exact a charge for this service: Finds in point of law that the defenders are liable to the pursuers for the value of the said trunk and its contents: Therefore decerns the defenders to pay to the pursuer the said Adolphe Michael Levy Johnston the sum of £16, 10s. 6d. sterling; and to the pursuer the said Mrs. Helen Urquhart or Johnston the sum of £12, 18s. sterling, as concluded for: Finds the pursuers entitled to expenses, allows an account thereof to be lodged in process, and remits the same when lodged to the Auditor of Court to tax and report, and decerna.

“CHARLES RAMPINI.

“*Note.*—Whether the undertaking to convey the trunk in question from Granton to Edinburgh was an extension of the original contract, or was in effect a new contract, is under the circumstances of the case practically of little moment. If it is an extension of the original contract, the company would as common carriers be liable for loss of the trunk, whether that loss occurred before it was landed from the *St. Clair*, or during its transit from Granton to Edinburgh in their lorries, on the analogy of the well-known principle that a railway company contracting to carry goods to a point beyond their own line are directly responsible to the sender (*Metzenberg v. Highland Railway Company*, 7 M. 919, 41 J. 527; *Campbell on Negligence*, p. 36, sec. 35). If it is a new contract, and that contract a contract for hire, the defenders would be liable in respect of their culpable negligence in the performance of their obligation. Whether, therefore, they are liable as common carriers or under a less onerous obligation, the evidence as to the loss is, in the opinion of the Sheriff-Substitute, such as to throw on them the responsibility of making good the



value of the trunk and its contents to the pursuers. Admitting that their responsibility as common carriers ceased on the arrival of the goods at the port of destination, their obligation was not fulfilled by delivery to the passengers on the deck of the steamer a few minutes before its arrival in harbour. The company is bound to *land* both passengers and their luggage, and passengers who take possession of their effects when the same are brought up from the hold do so at their own risk. That the company admit their liability in this respect is apparent from the evidence of Mr. George Houston, their agent at Granton (Report of Commission, p. 17). But here no delivery to the passengers, either actual or constructive, took place either on the deck of the steamer at Granton or on the quay. The luggage was never taken possession of either by Mrs. Johnston or her son. It remained where it was placed after it came out of the hold until an alteration in its destination was arranged between Mrs. Johnston and the steward.

"It was agreed that the trunk should be sent to an address in Edinburgh by the company's lorries which run between Granton and Edinburgh. It is argued, that in undertaking what he did, the steward went beyond the scope of his employment, and that he had no power to bind the defenders. It is further argued, that even on the supposition that this was a personal contract between the steward and Mrs. Johnston, the former could not be held individually liable in respect that he performed what he undertook. The Sheriff-Substitute thinks both of these arguments untenable.

"Very great difference of opinion seems to prevail amongst the officials of the company as to what the duties of a steward in respect to passengers' luggage are. Mr. Henderson does not think the steward has anything to do with it at all, and naturally the steward himself takes the same view of his duties. Mr. Merrylees, on the other hand, seems to think that all that can reasonably be expected of him is that he should see the luggage put into the hold. But it is very plain that if passengers' luggage is to be compulsorily taken out of their control during the whole course of the voyage, the company are bound to assign to some one or other of their servants the duty of looking after it, and that duty implies three things, viz. its reception on board, its custody during the voyage, its delivery on landing. If passengers see some portion of these duties performed by the steward, they have a right to expect the performance of them all.

"But, apart from that, the company, as a matter of fact, run lorries between Edinburgh and Granton, and these lorries convey passengers' luggage between these two places, and the company earns money by doing so. A passenger wishing to have his trunk sent on to Edinburgh can have this done by the company—'by special request,' says Mr. Merrylees—and on paying for it. To whom is the passenger to apply when he wishes it done? To the *agent* at Granton, says Mr. Merrylees; to the *clerk*, says Mr. Houston; to the *foreman*, apparently says the steward. If so, why did not the steward tell Mrs. Johnston that he was not the proper person to whom she ought to apply? She, according to Henderson's statement, tells him she wishes her trunk sent on, and he undertakes the duty of letting the foreman know this. He—the servant of the company which owns the lorries on which the goods are to be carried, and the official to whom a passenger would naturally address himself in all inquiries relating to his luggage, without directing the passenger to the official who, it is alleged, has alone the right of undertaking such an obligation—undertakes to put the matter in the hands of another of the company's servants more immediately responsible for the carriage of the article. And the company's officials not only do not repudiate their liability when the trunk is lost until the 18th April, but actually take steps to recover it; and they admit that stewards have on other occasions acted as this steward did, without remonstrance from them, or without repudiation of liability. In a word, the company were prepared, if the trunk came safely to hand, to admit their liability and charge for the carriage. On the other hand, if it was lost, they would deny that they were bound to pay for it.

"But the *onus* in cases of this kind is against the carrier. The company have led no evidence to rid themselves of this *onus*. The steward told the foreman; but the foreman is not called to say what he knows about the matter. The inference is that the company can give no satisfactory account of what became of it.

"The Sheriff-Substitute has no desire—and if he did so, he would be exceeding his duty—to say a single word in this note in disparagement of a company which apparently strives its best to accommodate and convenience those who travel by it. But he may be permitted to express a hope that the present case, exposing, as it does, the very lax system in use on board their ships in relation to passengers' luggage, may lead to an improvement which will not only be a boon to passengers but beneficial to the company itself. C. R."

*Larwick, 22nd December 1879.*—The defenders appeal to the Sheriff.

"ALEX. MACGREGOR, *for defenders*."

On appeal, the Sheriff (Thoms) adhered with additional expenses.

*Act.*—Duncan and Galloway.—*Alt.*—Sievwright and Macgregor.

## SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

MURRAY v. MORISON.

*Sequestration—Competition for trustee — Production of vouchers.* — Rear-Admiral Jack Henry Murray, residing at East Haugh, near Pitlochry, presented a petition in the Perth Sheriff Court for sequestration of his estates. At a meeting of his creditors, held in pursuance of the bankruptcy statutes, Mr. Robert Morison, accountant, Perth, and Mr. Horace Skeete, solicitor, Perth, were severally nominated for the trusteeship, and on a vote being taken Mr. Skeete was found to have the apparent majority. Certain objections were, however, taken to the vote of Mr. Skeete's principal supporter. The chief vote was founded on an affidavit by the trustee on the sequestrated estate of a son-in-law of the Admiral claiming a large sum of lent money. A bond granted by the creditor was said to have been destroyed by the creditor and afterwards separately discharged. It was further sworn that a process had been brought to set up the bond, and a reduction to set aside the discharge, and the records were produced at the meeting of the creditors. After hearing a debate Sheriff Barclay has issued the following interlocutor sustaining these objections, and nominating Mr. Morison to be trustee :—

"*Perth, 24th December 1879.*—Having heard parties' procurators, and made avizandum with the notes of objections, and whole proceedings: Finds (first) that according to the minutes of the meeting of creditors, held on the 4th December current, there voted for Mr. Horace Skeete creditors to the value or amount of £8223, 4s. 7d.; and for Mr. Robert Morison and Mr. J. C. Pinkerton in succession creditors to the value or amount of £2189, 6s. 6d., leaving an apparent majority in favour of Mr. Skeete of £6033, 18s. 1d. Second, parties agreed that the discussion should be confined and the decision limited to one vote given and recorded for Mr. Skeete, namely, the vote of Mr. Ewan Fraser for £7756, 4s. 7d. Third, finds that vote not supported by sufficient vouchers in terms of the statute, and which being deducted from the amount and value voted for Mr. Skeete, places his competitor, Mr. Morison, in a majority of £1712, 6s. 6d. Therefore finds and declares Robert Morison and James Colquhoun Pinkerton in succession duly elected trustees on the sequestrated estate of Admiral Jack Henry Murray; and in like manner Messrs. Hugh Mitchell, solicitor, Pitlochry; David Jackson, seedsman, Perth; and Robert Marshall, wood and coal merchant, Pitlochry, the commissioners elected on the same vote; reserving to the claimant, Mr. Ewan Fraser, his right under section 50

of the statute to be ranked so as to draw the dividend arising from the sequestrated estate as accords : Finds Robert Morison entitled to costs, and decerns in his favour for £2, 2s., in name of costs, against Mr. Horace Skeete.

“HUGH BARCLAY.

“*Note.*—There are, and could be, no personal objections against the competitors, both of whom are beyond all exception equally competent for the management of the estate. Although adverse interest in a creditor voting may not be an objection in competition for the trusteeship, yet it may have no small influence on a trustee who has solely been placed in office by a creditor possessing a positive and distinct interest adverse to the general body of creditors. It is not unworthy of remark that whilst twenty creditors recorded their votes for Mr. Morison, only thirteen voted for Mr. Skeete. So, if numbers were the rule, the latter gentleman would be out numerically, and when the large vote now disallowed is struck off, he is placed in a minority in value.

“There is an obvious distinction drawn in the statute between voting in the course of the sequestration and in obtaining a ranking and dividend. In the former case the creditor has only to swear to his claim, and produce all vouchers to prove his debt within his power. In short he must make out a *prima facie* claim of debt. In competition for trusteeship, the claim to vote depends solely on his affidavits and vouchers. But the trust exercises a semi-judicial office in admitting or rejecting a creditor to rank. He may and is bound where necessary to call for further evidence, and he may admit or reject the claim either wholly or partially. The award is subject to appeal to the Sheriff and supreme Courts.

“The 49th section of the statute distinctly requires that to entitle a creditor to vote he shall be bound to produce the vouchers ‘necessary to prove the debt.’ Mr. Murdoch in his work on Bankruptcy under this section justly notes, ‘If vouchers are not produced, no matter from what cause, the creditor cannot vote.’

“Now in the first place the claim of Mr. Fraser is founded on advances or loans of large sums of money. These can in law be proved only by writ or oath of the borrower. The claim is founded on the oath of credulity of the trustee on the bankrupt estate of the lender. Whether in the circumstances it may be held equivalent to an oath of verity it is the oath of the creditor in the loan and not of the debtor. The loan is said to be constituted by a bond and assignation. Had that document been produced, it would undoubtedly have proved the debt. The affidavit has been very artistically framed ; but it sets forth that no bond now exists, that it has been destroyed not by the debtor therein, but by the creditor, and that an action to prove its tenor has been instituted to resuscitate it, but which has been defended and is in dependence. The Court will not only require proof of the tenor, but the cause or reasons of its destruction. Not only is the destruction of the bond sworn to, but further that the bond has been discharged by another deed, and that an action of reduction has been instituted to set aside that discharge, and which action is also defended and is in dependence. In these circumstances surely it cannot be said that the trustee of the creditor in the bond should be admitted to vote in a competition to elect a trustee who may have an interest or predisposition adverse to the interests of the general body of the creditors.

“The Sheriff-Substitute had the privilege of hearing a very able and exhaustive debate with reference to a multitude of decided cases, all of which he has patiently examined. He has felt no small anxiety in the case, seeing that there is no review of his decision. He has come to the decided conclusion that Mr. Fraser’s vote cannot be counted in the voting and as settling the competition. There are two authorities which chiefly bear on the issue. There is the case of *Paul v. Gibson*, chiefly relied on for Mr. Skeete. It will be found in the 6th vol. of the *Jurist*, p. 262, under date 13th February 1834 ; and again as affirmed in the House of Lords, under date 14th June same year, reported in same vol. p. 508. In the first place it will be remarked that the claim was not for money lent, provable only by writ or oath, but to account for shares of the succession and estate of a deceased party provable *habili modo*. There was an action of count and reckoning in dependence to ascertain the

precise share due to the creditor claiming to vote, but the creditor swore to a precise sum, and to a specific state. Lord Moncreiff, the Ordinary, certainly no mean authority, rejected the vote. The Court, however, admitted the claim to vote, but their attention, according to the report, was chiefly directed as to whether the oath was to be held one of credulity or verity. The decision was with some hesitation affirmed by the Lord Chancellor on appeal, but it is worthy of remark that his Lordship went greatly on the inadvisability of raising questions in competitions for trusteeship, and rather deprecated the law of Scotland for allowing such litigations, which has since been repressed.

"The solicitor for Mr. Morison chiefly relied on the case, 20th June 1835, *Lizars*, 7 *Jurist*, 427. There the claim to vote was rejected because there was no voucher of any kind, but a depending process to instruct the debt, although it is reported that the depending process was produced in which the advances were admitted, which is a sufficient compliance with the statute. It is worthy of notice that the prior case of *Paul v. Gibson* was quoted, but did not influence the unanimous decision of the Court, who held that a depending process did not vouch a debt, although the affidavit specifically set forth a certain sum as being due. In this case certain steps in the two actions are produced, but so far from proving the debt they show that the bond has been destroyed and moreover discharged; and the defenders deny that there is or ever was any debt due.

"The solicitor for Mr. Skeete, perhaps inadvertently, quoted the case, 12th June 1852, *Anderson v. Guild*, 24 *Jurist*, 519. There the vote was rejected, but on different grounds from those in this case. But it is worthy of notice that the Lord President remarked, 'It may be that the creditor may make out a good case for ranking, but in the question of voting I am not for sustaining the claim as sufficiently vouched;' and Lord Ivory remarked precisely as occurs in the present case, 'The election turns upon one vote. Now if there be any suspicious circumstances connected with the debt, we should not leave these to be investigated by the party whose interest is committed to the support of the document.' The solicitor for Mr. Skeete referred to certain holograph letters from the bankrupt as vouchers of the claim, but (1) these letters do not prove their dates, (2) they do not acknowledge any specific sum, and (3) more specially they all refer to the bond; and therefore, if the principal deed has fallen, so must all relative writs meet the same fate. H. B."

Act.—M'Cash.—Alt.—Mitchell.

## SHERIFF COURT OF ABERDEEN.

Sheriff DOVE WILSON.

BROWN v. MARR, ETC.—January 12, 1880.

*Wages Arrestment Act.*—This was an action of furthcoming in the Small Debt Court at the instance of George Brown, merchant, New Pitsligo, against William Marr, farmer, Claystiles, Rathen, and John F. Strath, labourer, New Pitsligo, the common debtor, for the sum of £8, 17s. 11d. As the case appeared in Court, it transpired that Marr had been engaged as a harvest hand in the season of 1879, and that decree had been given against him for the said sum in an action at the instance of the pursuer. Upon that judgment the pursuer arrested the wages of the common debtor in the hands of the farmer. Objection was taken that the arrestment was invalid in respect that the sum earned did not amount to £1 per week.

Sheriff Dove Wilson, who heard the case, gave judgment in the following terms:—

"This is an action which raises a point of some interest under the Arrestment of Wages Act. The common debtor was what is known as a harvest workman, and was engaged to work for the period of the harvest, whether it was short or long, at the fixed wage of £4. The wage was earned, and the amount has been arrested in the hands of the farmer by one of the

creditors of his workman, and it is now contended that the arrestment is void in respect of the provisions of the Arrestment of Wages Act. The words of the Arrestment of Wages Act are very broad, and they seem to me to cover this case. The first section of the Act provides 'that the wages of all labourers, farm servants, manufacturers, artificers, and workpeople shall cease to be liable to arrestment for debts.' These are very wide words, and it seems beyond doubt that a person engaged to work at a harvest comes under them in one shape or another. The only point that might be argued might be whether the amount that this person earned was fairly to be described as wages, or whether it could not be described also as the price of a contract for work executed; but I think there is no other meaning can be given to the word wages except that it is a reward to a person engaged as a servant. The contract clearly here was one between master and servant. The employed was bound during the time to obey all the lawful orders of the employer, therefore I think that what he earned was fairly to be called wages. But there is a second section of the Arrestment of Wages Act which provides that if the amount of wages earned exceeds 20s. per week, any surplus above that amount shall still be liable to arrestment. This case does not come under that exception, because the amount earned was less than 20s. a week. The whole of the amount of wages was £4, and the harvest lasted five weeks, therefore the sum paid came to less than £1 per week. It might be that under other circumstances, if the harvest had been short, the earnings might have been more than £1 a week, and might have been liable to arrestment. But then the words of this section are not 'if the wages payable,' but 'if the wages earned,' exceed 20s. per week, then they are liable to arrestment for the surplus. It was contended, under the authority of Mr. Fraser (Master and Servant, 2nd ed. p. 795), that a case like this did not fall under the Arrestment of Wages Act, because it was a case where a person was paid by the job. The reason Mr. Fraser gives for that opinion is that such a case as this would not have fallen under the old Master and Servant Acts, as the servant would not have been liable to be punished under them; but that reason has now fallen away, because since Mr. Fraser wrote, the Employers and Workmen's Act was passed in 1875, and under that Act a case like this is expressly brought in, as section 10 of that Act provides that it is to apply to all contracts of service, whether it be a contract of service or a contract personally to execute any work or labour. Therefore the reason given by Mr. Fraser having now fallen away, his authority for the exemption also falls away; and therefore I think that this arrestment is struck at by the Arrestment of Wages Act, and that consequently nothing can be recovered under it in the present case.

"The summons consequently is dismissed."

Act.—Shives.—Alt.—Meffet.

## SHERIFF COURT OF RENFREW.

Sheriff FRASER.

BOAG AND OTHERS v. M'LAINÉ AND OTHERS.—*January 15, 1880.*

*Bankruptcy—Landlord's hypothec—Workmen's wages.*—This case arose out of the following circumstances. M'Laine had leased the premises at 28 Arthur Street from pursuers from 27th June 1879 till Whitsunday 1880, at a rent of £22, and entered on the business there of joiner and contractor. His affairs becoming embarrassed, his workmen, the other defenders, Brown and M'Call, sued him for their wages and obtained decree therefor. M'Laine failed to make good the decree obtained against him, and his goods, etc., in the premises at 28 Arthur Street were pointed and advertised for sale at the instance of Brown and M'Call. M'Laine having absconded to evade the diligence of the creditors, the pursuers—the landlords of the premises—who had received nothing for the rent thereof, stepped in and got an interim interdict against the sale of



the effects of M'Laine going on, and the present action was to determine whether the landlord or the defenders Brown and M'Call had the preferable right to the stock and effects of M'Laine. Pursuers contended that by the law of hypothec they had a right to the stock and effects of M'Laine in security for the rent; while, on the other hand, Brown and M'Call held that M'Laine being *notour* bankrupt, and the present defenders' pinding being for wages in his service as workmen or servants, their claims were preferable over his estate even to the landlord's hypothec. Sheriff-Substitute Smith found that the wages for which Brown and M'Call had got decrees did not exceed the wages of two months prior to the date of M'Laine becoming *notour* bankrupt, and therefore decided that the wages of Brown and M'Call were preferable debts to the debts due to the landlords, the pursuers: therefore recalled the interim interdict, and found the defenders Brown and M'Call entitled to expenses.

The case was appealed to the Sheriff, who issued the following interlocutor:

"The Sheriff having considered this process, Dismisses the appeal for the pursuers, adheres to the interlocutor appealed against, and decerns: Finds the defenders entitled to additional expenses, allows the account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

"PATRICK FRASER.

"*Note.*—The Sheriff has carefully considered the question which has been here raised, and now adheres to the opinion which he has elsewhere expressed. In the first place, it must be determined whether the wages of domestic servants from the current term are preferable to the landlord's claim for rent; because the defenders cannot obtain the benefit of the Act 38 and 39 Vict. c. 26, sec. 3, without having the point determined in the affirmative. The law has recognised, in the distribution of estates, whether on death or bankruptcy, a preference in favour of a certain class of creditors who are called 'privileged.' Professor Bell states the ground upon which this rests to be 'considerations of humanity' (2 Bell, Comm. 1, 6), or, as he expresses it in his Principles (sec. 1402), 'certain debts are privileged, and although not strictly referable to the principle of hypothec, they produce, as to moveables, the same effect as a universal hypothec over the whole property of the debtor. They are called privileged debts, and this privilege rests on various grounds—sometimes of humanity and charity, and sometimes of expediency in encouraging useful institutions.' Erskine (3, 9, 43) traces the law to the same source. Now, amongst these privileged debts are included the current wages of domestic servants, the rule in regard to them being first established by the case of *Crawford v. Hulton* in 1680 (M. 11, 8, 32). The privilege was further extended in favour of farm servants, reapers, and other occasional servants for agricultural labour; and in the case of *M'Glashan* (29th June 1819, F. C.) it was settled that the wages of farm servants for the current term formed a preferable claim to the landlord's hypothec. No decision of the Supreme Court has hitherto been pronounced as to whether the claim of a domestic servant for his or her wages would prevail against the landlord. So far as Mr. Hunter indicates an opinion it is in favour of the privilege. After stating that farm servants had priority over the landlord, he takes exception to certain decisions of the Court, which denied it to artisans and mechanics, whose right, he says, rested upon the same considerations of equity and expediency that lay at the foundation of the case of *M'Glashan*. 'The mechanic who by manual operations, and the overseer who by skill and ingenuity, convert the raw material into manufactured produce, are in a situation precisely similar to a farm servant. . . . It is worthy of serious reconsideration whether, consistently with principle, such claims ought to be overruled, even in competition with a landlord.' And on the matter in hand he shows his opinion thus: 'In Fraser's treatise on the Law of Domestic Relations an opinion is indicated that the preference may be extended to domestic servants. Equity would sanction the extension; and there is no "obstant decision"' (2 Hunter, Landlord and Tenant, p. 384). The point being thus still an open one, it is necessary to consider whether the



ground upon which the privilege rests would warrant its application to a case like the present. Whether it be humanity, or charity, or expediency, or hypothec, it seems just as right to give a preference to a domestic servant over the landlord as over other creditors who had given furnishings to the house of the master, to whom the landlord let the house. Funeral expenses and the wages of farm servants show that the landlord's claim, though it be somewhat of the character of a real right, will be postponed in the ranking to other debts which it would be inequitable not to pay in the first place. Under the old French law, as stated by Pothier in his treatise on Hiring (No. 256), it appears that the landlord's claim was postponed to the claims of several other creditors, beginning with the creditors for funeral expenses and deathbed sickness. Reapers, he mentions also, were preferred to the owner of the farm for their wages on the grain which they had cut; and in some provinces he mentions that the carpenters and farriers who had given their services had a preference over the crop as having made the farm more valuable. He does not take notice of domestic servants; but in the Code Civil the matter is made more distinct (sec. 2101), and the order in which privileged creditors are to be ranked is specified. The first in order is the legal expenses incurred in collecting the estate; the second, the funeral expenses; the third, the expenses of the last sickness; the fourth, wages of servants for the past year and what is due for the current year; the fifth and last, furnishings made to the debtor and his family by retail merchants during the past six months. And among the decisions noted by Sirey on this section, there are several to the effect that servants (*gens de service*) include those who act for the master for a continuous time in any service whatever, such as a carrier or porter for a commercial house, or the workmen at a building. The law of England upon this subject is contained in the Bankruptcy Consolidation Statute (32 and 33 Vict. c. 71, sec. 32), and which is in the following terms: 'The debts hereinafter mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and *shall be paid in full*, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate, in equal proportions, between themselves—that is to say (1) local and public taxes as described in the Act; (2) all wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication not exceeding four months' wages or salary, and not exceeding fifty pounds; *all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages.*' The subsequent Act of 38 and 39 Vict. c. 26, which applies to Scotland only, gave the same reference as this English Act did to workmen for two months' wages. But, unfortunately, it did not use the same general language. It gives to them wages for two months—'the same privilege' as domestic servants enjoy—thus rendering it necessary to determine what privileges domestic servants have. The Sheriff does not think that he is by this decision in any way infringing upon the large privileges which the landlord's hypothec gives him; but he is not inclined in any way to extend them, which, he thinks, he would be doing by a decision in the pursuer's favour. Other systems of law recognise the servant's preference on the same grounds of humanity, or expediency, or charity, or hypothec, which are the groundwork of our own, and such cases as have occurred in our own Courts where there was competition between the landlord's hypothec and privileged debts have resulted in the defeat of the landlord. The difficulty in the case arises from the reason assigned by the Court in the case of *M'Glashan* for preferring the claim of farm servants to the landlord. Several of the judges rest their opinions upon the ground that the crop having been created by the labour of the servants, they were entitled to the preference for their wages; and Lord President Hope stated it as his view that all privileged debts rest upon the principle that the labour of the privileged creditor is *in rem versum* of the parties postponed, except perhaps the wages of menial servants and funeral expenses, which seem rather to rest on views of expediency' (1 Bell on Leases, 417). This doctrine of *in rem versum* his Lordship applies in rather a

curious way thus: 'Even the preference given to physicians' fees rests upon this principle; for that it must in general be advantageous to the creditors to keep the debtor alive.' In the subsequent case of *Drysdale v. Kennedy* (15th December 1835, 14 S. 159) it was determined that 'the surgeon's claim for the deathbed charges was preferable to the landlord's under his hypothec.' But there is no distinct statement in any of the reports upon what principle the judgment was rested. At all events this may be said of the ratio in the case of *M'Glashan* that it has been disapproved of by Professor Bell, who expresses himself in much the same way as Mr. Hunter does, as follows: 'The principle here assumed is not, with great deference, the true principle of this privilege, otherwise it would go beyond the term in many cases, and would extend to manufacturers and artificers, which it does not (1 Bell, Ill. 447).' P. F."

Act.—A. Boag.—Alt.—G. H. Black.

## SHERIFF COURT OF BANFF.

Sheriff SCOTT MONCRIEFF.

MACGILLIVRAY v. DALLACHIE.—6th February 1880.

*Condictio indebiti*.—Circumstances in which held that no relevant averment of payment in error had been set forth. Charles Dallachie, gardener, Hillhead, Banff, held an acceptance from Mrs. Margaret Macgillivray, sometime residing at Cairnandrew, now in Macduff, for £13, 8s. 9d., which fell due on 20th May last. The bill was protested and a charge of payment given on 5th June last. Upon the 11th of the same month Mrs. Macgillivray and her agent had an interview with Mr. Dallachie's agent, at which, as both parties admitted, Mrs. Macgillivray denied liability for the bill debt, and alleged that Mr. Dallachie had agreed to rank for it on the sequestrated estate of Peter Gordon, Cairnandrew, which, defender's agent stated, his client denied, but admitted that Peter Gordon's trustee alleged the contrary. The parties further admitted that Mrs. Macgillivray and her agent then went and saw the trustee, and on the same day returned to defender's agent's office and, in the full knowledge of the conflicting statements of the parties, paid the debt under the diligence; that defender's agent declined to accept conditional payment, but, at pursuer's agent's request, had inserted in the discharged state of debt the reservation of Mrs. Macgillivray's alleged claim against Peter Gordon's trustee, with the addition, "By which reservation, however, the said Charles Dallachie shall in no wise be prejudiced." Mrs. Macgillivray thereafter brought an action for recovery of the amount against the trustee, not *qua* trustee, but individually. In that action, after proof was led, the trustee obtained decree of absolvitor. Mrs. Macgillivray then brought an action in the Ordinary Court against Dallachie for repayment of the bill debt, interest, and expenses. Dallachie pleaded *inter alia*—(1) that suspension of the charge was pursuer's remedy, if she was not due the debt charged for, and that she was not entitled to pay *simpliciter*, and then bring an action of repetition; (2) that, at all events, if entitled to bring such an action, she must aver and offer proof that she made the payment under essential error, in fact unknown to and unsuspected by her at the date of payment, and that in the absence of such averment the petition fell to be dismissed; (3) that the pursuer having made the payment deliberately, by advice and in presence of her agent, in the full knowledge of the conflicting statements of the parties on the question whether defender had consented to said agreement, and after such inquiring into the facts as her agent deemed necessary, was not entitled to sue for repetition, and that the defender ought to be assoilzied; and (4) that there being no relevant case averred the petition should be dismissed with expenses.

The following is the interlocutor pronounced by the Sheriff-Substitute:—

"*Banff*, 6th February 1880.—The Sheriff-Substitute having heard parties' procurators on the closed record and made avizandum with the whole process,

Finds, in point of fact, that it is admitted that the pursuer accepted a bill drawn by the defender, and dated the 17th day of April 1879, for the sum of £13, 8s. 9d., and that said bill represented a debt for which the pursuer held herself responsible as owner of the subjects upon the farm of Cairnandrew : Finds that upon the 6th day of June 1879 the defender executed a charge for payment of said sum of £13, 8s. 9d. against the pursuer : Finds that upon the 11th day of June 1879, being the day before said charge expired, the pursuer and her agent went to the agent of the defender and stated that the defender had given his consent to a written agreement under which he was to rank for his debt in the sequestration of the pursuer's son-in-law, Peter Gordon : Finds that the defender's agent, on his behalf, denied the truth of this statement, but admitted that, according to the statement of the trustee upon the said Peter Gordon's estate, the defender had verbally agreed as alleged by the pursuer : Finds that the pursuer and her agent then went to the said trustee, who informed them that the defender had so agreed, though he had not signed the document which embodied said agreement : Finds that the pursuer and her agent then returned to the defender's agent and paid to him the amount contained in the said bill, together with interest and expenses of the defender's diligence, amounting to the sum of £14, 6s. 3d., now sued for, and that the pursuer received from the defender's agent a receipt for said sum, containing, as requested, a reservation of the pursuer's claim of relief against the said trustee : Finds that the pursuer subsequently raised an action against said trustee in the Small Debt Court of Banffshire for recovery of this sum, in which decree of absolvitor was pronounced : Finds that the defender has never signed the agreement referred to by the pursuer : Finds that the pursuer in the present action seeks to recover the said sum of £14, 6s. 3d. from the defender on the ground that it was paid to him under essential error in fact caused by his misrepresentation or fraud, and now avers that the defender was a party to said agreement : Finds in point of law, and in respect of the above findings in fact, that the grounds of action set forth are not relevant or sufficient to warrant the prayer of the petition : Therefore sustains the fourth plea in law stated for the defender, and refuses the prayer of the petition and decerns : Finds the pursuer liable in expenses, etc.

“ W. G. SCOTT MONCRIEFF.

“ *Note.*—I am always unwilling to exclude evidence, but in the present case it appears to me that to allow a proof before answer would only cause needless delay and expense. The pursuer seeks in this claim to recover a sum of money which she alleges was paid by her to the defender under essential error in fact, induced by him or his agent. If there really was an essential error in fact, it would be probably unnecessary for her to prove that the defender was the author of it ; for even where honesty has characterized the actings of both parties, money paid under a mistake may be recovered. This seems to be the doctrine of recent decisions as expressed by Lord Shand in the case of *Balfour v. Smith and Forgan* (9th February 1877, 4 R. 462). But everything depends upon the circumstances under which the money was paid. In the present case these are fully stated in the ninth article of the condescendence and answers thereto for the defender ; and the mutual and candid admissions which the parties make render proof concerning this matter of the payment quite unnecessary. The pursuer having been charged to pay this debt, renewed by a bill a short time previously, goes to the defender's agent, accompanied by a legal gentleman who was well qualified to advise her. They tell their story, to the effect that defender had consented to seek payment of his debt from the sequestrated estate of the pursuer's son-in-law under a written agreement. The defender's agent admits that the trustee upon the estate alleged this, but at the same time he, on behalf of his client, denies that it is true. Upon hearing this the pursuer and her agent go away to the trustee and consult with him. They then return and the pursuer pays the money (which is now sought to be recovered) without making any protest, and receiving a receipt reserving her claim against the trustee alone. She

then brings an action in the Small Debt Court against him, the ground of which is that he had made a false representation in stating that he had obtained the defender's consent, 'when you had not, in point of fact, obtained such consent.' It is therefore perfectly obvious, judging from her action, that the pursuer, having had an opportunity of considering the matter, paid the money, believing the defender's assertion; and not that of the trustee, and holding it to be the fact that the defender never gave his consent. But if he did not, then there is no other ground stated upon which payment of this bill could be resisted, or, having been made, recovered. It is not stated that any new facts have come to the pursuer's knowledge, and it is quite clear from what is stated in the condescendence that the pursuer has brought the present action in consequence of being unsuccessful in that raised by her against the trustee. She says, 'Until the determination of that action it was impossible for the pursuer to know whether the present defender's or Mr. Hossack's (the trustee) statement was correct.' It is clear, therefore, that the error under which the pursuer made the payment was one relating, not to the facts, but to the result of these facts when sifted in a judicial process. She knew then, as she knows now, that the trustee says one thing and the defender another; but whereas at that time she believed the latter, she now believes the former. Now I do not think the pursuer can point to a single case in which in anything like similar circumstances repayment upon the ground of *condictio indebiti* has been ordered by the Court. Take the case of *Balfour* already referred to. There the pursuer alleged that he had overpaid the balance of an account by bill, not having the cheques already granted at hand, and trusting to the defender's statement that it was correct. When he got access to his cheques he found out his mistake. The Court here allowed proof, but how different were the circumstances of that case and the present. And it may be observed that not only were the circumstances different, but that whereas in that case the defender was alleged to be in possession of a sum of money which he had never earned, it cannot here be disputed that the amount of the bill was really due to the pursuer, and it is exceedingly doubtful whether parole evidence is competent to establish this matter of the defender's consent, depriving him, as it does, of his privilege as the holder of a bill.

"In deciding *Balfour's* case the Lord President said, 'A party having made a payment in error must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances or to the proceedings of the other party.' Now here we have a deliberate act on the part of the pursuer by which she accepted the truth of the defender's statement, and elected to seek her remedy at the hands of the trustee. If she was mistaken in this it was her own fault. No doubt it is said that when the pursuer's agent was consulted the charge had almost expired, and immediate diligence was threatened. But again it was the pursuer's fault if she failed sooner to take legal advice. Although the view stated by Mr. Justice Williams in the case of *Townsend and Crowdy*, and quoted by Lord Shand in that of *Balfour*, is very favourable to the pursuers of such actions as the present, there is nevertheless one limitation made, the party 'must not waive all inquiry.' Here I think the pursuer did what was equivalent to waiving inquiry concerning the truth of the defender's assertion. She was put on her guard, and she accepted it as true.

W. G. S. M."

Act.—Allan and Soutar.—Alt.—Watt.

# THE JOURNAL OF JURISPRUDENCE.

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## THE REGISTRATION APPEAL COURTS OF 1879.

### II.

WE have, lastly, to consider a group of cases in which the objections taken were all of them in a greater or less degree of a technical character. This is a feature only too well known in the Registration and Registration Appeal Courts, and certainly it was very conspicuous in those of 1879. We may, however, first of all refer to the cases of *Bell v. Donaldson* and *Alexander v. Donaldson*, both reported as No. 5, 17 Scot. Law Rep. 161. These cases, although certainly of a technical character, were certainly most fit and proper subjects for discussion and decision, because in various counties an opposite course has been adopted by the assessors, and it had become necessary to have some uniform rule. The circumstances under which Bell and Alexander claimed to be enrolled can be very shortly stated, and it will be seen that practically they were, save in one, and as we venture to think, very important item, the same. Bell in May 1877, and Alexander in September 1876, had each received from a working men's building society an allocation of a house in Dumbartonshire, and they had respectively signed agreements in October 1877 and in November 1877, to purchase their houses by instalments spread over twenty-one years, paying their instalments as from the dates of their allocations. Bell's payments at 31st January 1879 did not amount to one-half of the price, but Alexander's did, and herein lay the difference between their claims. Under the rules of the society (to which, by the way, the Court allowed reference to be made, although they did not form part of the case) there was no right of property in the allottees "until the rent-charge of each house has been paid for the period stipulated," but an exception was made in cases where one-half of the price had been paid, when it was in the power of the purchaser to demand a formal disposition, on his granting a bond in security for the balance due to the building society. In March 1879 verbal consent was given by the society



to the householders to redeem their rent-charges, and get formal dispositions in terms of another regulation, but this consent was not put into writing or minuted until 26th September 1879. An actual disposition was not ever granted in either case.

The point was whether truly they were owners so as to confer on them the franchise. The Court heard the cases together, but at advising they were unanimous as to Bell, while as to Alexander Lord Ormidale dissented. In *Bell's* case Lord Ormidale expressed himself as satisfied that Bell was not within the exceptions to the rule which declared that until the rent-charge was paid no right of property was in the allottee. That essential condition had not been satisfied. Lord Mure added: "These rules and regulations are incorporated with the minute of agreement, and the two must be read together as one document. We find it expressly declared 'that until the rent-charge of each house allotted has been paid for,' the allottee 'shall have no right of property therein except as after mentioned.' Then certain conditional exceptions are mentioned, but the conditions of those exceptions have not as yet been purified by the claimant; so that he has not as yet acquired any right of property in the subjects."

In *Alexander's* case, however, the half of the instalments had been paid up, and Lord Ormidale thought that his right of property must be deemed complete, for by his payments he had escaped the suspensive condition of the rules as to the acquisition of any right of property, and his not having obtained a feudal title was immaterial. He had truly the radical right, and by the exception which gave him power on granting a bond to demand a formal disposition, he was placed in the position of an owner with the balance of the price merely as a debt against him. The majority, however, of the judges took an opposite view, and from what is reported of their opinions we may gather that this decision proceeded upon the fact that as at 31st January 1879 the claimant (though he had paid up more than one-half of the price) had not received nor indeed applied for permission to redeem, and grant a bond in the way we have mentioned, and consequently he was not, their Lordships thought, owner at the date requisite for his enrolment on the register of voters as proprietor. As far as regards Bell we cannot but think that the appeal was most properly dismissed, he was not even in a position to demand a title from the society on 31st January, and whatever the rights he had acquired subsequently might be, they could never be held to throw back ownership in the way contended, *stante* the express rule of the original contract. As far as regards Alexander, he certainly was in a position at 31st January to demand a formal title, and had he done so he must have succeeded beyond a doubt, but he did not act upon the power he possessed, and the question very much came to be one of whether this was to be regarded as a piece of neglect for which he, being himself responsible, must suffer.



We cannot but feel this is a doubtful matter, still the results of the decision may very reasonably have been influenced by two considerations: (1) The express terms of the rules would almost seem to require, in order to get rid of the suspensive regulation as to the right of property, something more absolute and express than the mere fact of the payment of so many instalments of the price. (2) That being so, there is much difference between demanding and obtaining under the rules, and merely being in the position to do so. (3) There were taken subsequently by Alexander steps to do what had not been done timeously, and the mode of procedure as regards the minute of consent to redeem was suspicious if he truly was the owner at 31st January 1879.

The objection taken to the names of J. R. Ovens and others, in the case of *Anderson v. Ovens and Others* (No. 17, 17 Scot. Law Rep. 170), was also of at best a quasi-technical character, for it turned largely upon the formal nature of the proceedings of the trustees and upon their title to the subjects. Mr. Ovens and his brothers were trustees and beneficiaries under the will of their father, who directed his trustees "to convert into cash, collect, recover, and realize" the whole trust-estate, authorizing them for that purpose "to sell whatever part of it as may require to be sold." The period fixed for this action was the attainment of majority by the youngest child, an event which had taken place. The whole purposes of the trust had been fulfilled, the property had remained unsold, the rents being paid to the beneficiaries, and in fact all that was wanting was a formal conveyance of the subjects. The successful argument pressed by the appellant was that the right, owing to the terms of the deed, was a moveable and not a heritable one. After referring to *Buchanan v. Angus* (4 Macq. 379), a case decided by the House of Lords altering on appeal a judgment of the Court of Session, Lord Mure proceeded to remark: "It appears to me that this estate must be held to have been converted into moveable property, and must be so dealt with. If any question of succession duty had arisen in regard to it, or if any creditor had required to attach the share of any of the beneficiaries, the rules applicable to moveable succession must have regulated the matter. Or if any of these claimants were to die intestate, his share would not belong to his heir in heritage, but would pass to his next of kin; and that being so, I am quite unable to see any sufficient grounds for holding that the shares can afford a qualification for enrolment as heritable estate. The case is not one in which it is left to the Court to gather from the various provisions of the deed whether the truster intended his trustees to convert his estate into cash. The direction to convert is express, and is the leading direction of the deed, and so long as that is left undone it cannot be said, whatever the trustees may think, that the purposes of the truster have been carried out." Now with all deference as regards these observations, we think the question may be looked at from somewhat a different

point of view. The trustees were themselves the beneficiaries, and the effect of the decision is that persons are disqualified electorally because they did not perform in due technical shape an operation which is equivalent legally to handing money out of your right pocket into your left. Again, there is the question of the radical right to this property. These gentlemen were really owners of it, barring a formal conveyance; they drew and enjoyed the rents and profits; was this land not to have any representatives electorally at all, though there existed persons in right of it? But this consideration brings us to another matter very vital to the decision upon which the opinions of Lords Mure and Ormidale differ exceedingly. Both judges made remarks upon the case of *Skeete v. Duncan* (1873, 1 R. 18). Lord Mure said it had been laid down there by Lord Ardmillan, with the concurrence of the other judges, that the Registration Court was not to apply the same rules of law as would be applied to a similar case if it came up as a question of succession. But his Lordship added: "I cannot agree in that view. The consideration of the rules of law applicable to succession necessarily arises in a considerable number of the cases, both of proprietor and of tenants, which are brought before Registration Courts; and by section 9 of the Reform Act of 1832 they are specially called on to deal with questions of that description; and if in these circumstances we were not to proceed according to the ordinary rules of law applicable to succession, I am afraid that very great confusion and inconvenience, if not injustice, might result. I must therefore hold myself bound to be guided by the law as administered in the Supreme Courts." On the other hand, Lord Ormidale, referring to the same authority, is reported as quoting from his own opinion there to this effect, "We ought not to deal with questions as to the franchise on the principles of law we would be bound to apply in a case of succession or of diligence, but it is sufficient that the claimant here is in possession, though a trustee, of an estate in itself heritable." His Lordship added, "I see no reason to go back on that opinion now." There are manifest reasons why to apply such strict rules of law in the Registration Court is inexpedient. In the first place, the statutes to be interpreted are enfranchising statutes conferring electoral rights on persons who did not enjoy them at least in the same way and degree before. To exact in all cases a similar strictness to that enforced in *Ovens'* case is to make the establishment of a right to the franchise in beneficiaries with an interposed trust always a matter of great trouble and of great expense. Now the whole provisions of the Acts of Parliament as to Registration Courts, appeals, and so forth, are manifestly intended to take away grounds of expense, to avoid technical objections, and simplify procedure, yet these requirements would lead to the very opposite result. We cannot think that Lord Mure's observations can have so extreme an interpretation put upon them as certainly some professional men seem to think, for the Registration Appeal Court has

itself recognised that it is not as other Courts are, by refusing, for example, to give any expenses where an appellant succeeds in getting a reversal of the Sheriff's judgment, and by limiting in other cases where the Sheriff is sustained the amount of expenses to £2, 2s. If the contention that the same strictness is not to be applied in these questions of franchise has any real weight—and, as we have seen, there is authority for saying that it has—then the force of the case of *Buchanan v. Angus* is greatly impaired, for it was not decided in the Registration Court at all.

We venture to think that in the case of the Messrs. Ovens the direction to sell is not absolute, and even if it were, that it may be doubted whether such an elaborate legal technicality as constructive conversion can be held to be applicable to Registration Court cases, rather than simple possession with the true right, however imperfectly formulated. There was nothing said as to selling in Mr. Ovens' trust-deed except the direction we have already quoted, and Lord Ormidale in his opinion trenchantly sums up the matter as follows: "If we can arrive at the conclusion that the purposes of the trust are all fulfilled, then also the direction to sell is at an end. And that the purposes of the trust are fulfilled admits of no doubt or question, as it is stated as matter of fact that they are. Now, I never heard it stated that we ought to hold that the mere act of denuding of the trust is a part of the trust purposes. This being the case, I think we must hold that the direction to sell is only peremptory till a certain time arrives, that is, until the purposes are fulfilled. If any question were to arise between the beneficiaries and the trustees, I cannot doubt that a Court, if all the beneficiaries were present, as they are here, and if they all agreed that they wished the estate to remain unsold, would order the trustees to hand it over to them and disregard the direction to convert it into cash." His Lordship no doubt in the last sentence of these remarks refers to a series of special cases, decided most of them within the last few years, where the Court has ordered trustees, at the instance of all those interested, to disregard directions as to the purchase of annuities, for example, and pay over the actual money to those who alone had an interest in it.

In *Campbell v. Richardson* (No. 15, 17 Scot. Law Rep. 169) an appeal was taken against the decision of the Sheriff, who had struck off the name of a person in minority at the time when he was placed on the assessor's list, but major before the day on which the Sheriff came to consider his right to be inserted on the list. It was attempted to be argued that as he could not have *claimed*, not being major until after the day for lodging claims had passed, therefore he could not be allowed to remain on the register if by an error of the assessor or owing to his not having been properly informed the name had appeared on his list. This contention, however, was disregarded by the Court in face of the 5th section of the 1868 Reform Act, which was deemed to be conclusive.

Another case of a technical objection was that of *Hunter v. Ballantyne* (No. 22, 17 Scot. Law Rep. 176). It could scarcely have been decided otherwise in the circumstances, which were those of the destruction of a studio belonging to a person enrolled as owner of "studio and garden," the latter alone not being sufficient in value to qualify. The fire took place on February 1st, there was an immediate restoration, and by April 1st a new and improved studio had been roofed in, and the value at that date was ample. The attempt to make out an interruption of occupancy failed entirely, but the case was remarkable as being the first of its kind so far as we can ascertain in Scotland, though an Irish authority in point exists.

A question as to a holograph unstamped letter was raised in *Skeete v. Turnbull* (No. 23, 17 Scot. Law Rep. 180). The letter, which bore date 1876, was an acceptance of an offer to feu, and in support of the claim there were the facts that (1) Turnbull had both in 1878 and 1879 appeared as proprietor on the valuation roll, and (2) that he held a receipt for the feu-duties back to 1876, although the receipt only bore date May 1879. We confess to thinking that Turnbull might in these circumstances have been placed on the register, for although the date of the receipt was certainly unsatisfactory in itself, the *bona fides* of the transaction was sufficiently clear from the entries in the valuation roll; and whatever the formal position of the title, at least it appears certain that the landlord might have been forced at any time to ratify solemnly the absolute contract he had entered into.

The lodger franchise has not hitherto given the Registration Appeal Court much trouble, whether owing to the transitory character of the right, or to the difficulty of dealing with lodgers, we cannot say. In the Wigtown Burghs, however, on this occasion there was raised a question of moment as regards at least the mode of securing this franchise. The cases will be found reported together as *Adair v. M'Bryde* and *Donald v. Adair* (No. 24, 17 Scot. Law Rep. 177). The point on which they both turned was the necessity for a lodger in each year to "claim to be registered." In one case (that of *M'Bryde*) the man was an elector in 1878, having made a claim; but in 1879 the assessor put him on the list without any written claim made by him, and without publishing his name as a lodger-claimant (Act 1868, sec. 19). In the case of *Donald* he had not been an elector previously, and he had verbally claimed to be enrolled. Lord Mure, after referring to the section (4) of the 1868 Act which relates to lodgers, and also to the specific directions and form of claim provided by section 19, sub-section 3, asked how a verbal request could comply with the requisites of the schedule. Under the Act it is remarked: "Persons other than lodgers in burghs do not require to give in yearly claims. They are transferred as a matter of course by the assessor from the valuation roll to the list of voters, and I presume the reason why a difference is made

in the case of lodgers is that they are not entered in the valuation roll, and there being nothing therefore on the valuation roll to enable the assessor to find them, they are obliged themselves to take the initiative." His Lordship also commented upon the fact that there was no advertisement by the assessor of the name of this person as required, and cited *Livingstone v. Oman* (5 R. 1) as being a case similar in principle. *Donald's* case was also mentioned as being weaker for the claimant than even *M'Bryde's*. There seems to have existed in the mind of the assessor a somewhat vague idea of the requirements of the Act as to lodgers, but this is not to be wondered at considering the small number of persons who among those entitled avail themselves of this franchise. The annual claim is troublesome, though we cannot sympathize with this attempt to evade or get rid of it; for by it alone, as we have seen, there is secured some publicity, and an opportunity for those to object who know of good reason for so doing.

The case of *Livingstone v. Oman* (5 R. 1), cited as an authority in the lodger cases by Lord Mure, was also held to be conclusive in *Allan v. Smith* (No. 2, 17 Scot. Law Rep. 158). Allan had till Whitsunday preceding the Court occupied a house of £16 value as tenant, but he then sublet to the extent of £5, and at the same time became tenant of the *top flat of the same house*. The Court adopted the view of the Sheriff, that this was a separate subject, that Allan had not put in a claim on his new qualification, and that he must accordingly be struck off the roll. In this case we begin our observations by quoting a sentence from the opinion of Lord Mure: "It is with reluctance that I come to this conclusion, as it seems to me to be pretty clear on the facts that the appellant has a right to be on the roll, but it is at the same time plain that he cannot avail himself of his new qualification, as he has not taken the steps necessary under the statutes to entitle him to do so." Now that remark contains the gist of our difficulties as to these technical questions in whatever form they may be viewed. What matters it if the man had a real right to be on the roll? If there were averments as to some subterfuge in the matter, that is altogether different; but this was a case of objection to one standing on the roll who had not even in acquiring a new qualification gone from under the same roof. It is all but incredible that our legislators intended to fence about the franchise with legal questions of abstruseness and admitted hardship.

Insufficient description of the subjects formed the ground of the objection in *Anderson v. Mackie* (No. 16, 17 Scot. Law Rep. 169). The Court, however, repelled the objection, and decided that "draper, Loanhead, joint tenant, Loanhead, Lasswade," was a sufficient description of the subjects. As to another objection that was taken in respect of want of description of the nature of the property on which the claim was founded, Lord Ormidale said, "No such objection is in the present case to be discovered from the



special case, or can be spelt out of anything therein stated. This may be a technical answer to the objection, but a party taking a technical objection cannot well complain of its being met by a technical answer." Another instance of an objection likewise termed by the same judge a technical one is to be found in *Lamont v. Richardson* (No. 14, 17 Scot. Law Rep. 168). This was an objection to an objection. The notice of objection sent to the assessor, or rather personally delivered to him by the objector, whom he knew, was peculiar in respect of (1) absence of dividing lines between the columns; (2) absence of headings to the columns; (3) designation of the objector simply as "Ralph Richardson, W.S., 19 Castle Street," without the word "Edinburgh." The ground taken by the majority of the Court was that the 44th section of the County Voters Act, 1861, applied. All doubt, it was observed, as regards the nature of this objection was set at rest by the fact that the alleged inaccuracies occurred in the notice given to the assessor, and not in that sent to the voter. It is undoubted that there were some things wanting in the notice here, and it would have been more correct if they had been inserted. But all that was essential in substance was to be found in the notice as it had been actually delivered.

The three last cases of which we have to take notice all refer to questions of proprietor becoming joint proprietor and *vice versa*. In *Anderson v. Mercer* (No. 11, 17 Scot. Law Rep. 166), Mercer was originally sole proprietor, but became joint proprietor afterwards. He made a correct return, was duly entered in the valuation roll, and in fact did all he required to do. The assessor omitted to add the word "joint" to the register, but the Sheriff made the correction and was sustained by the Appeal Court in doing so. As Lord Mure said, "the question falls to be dealt with under the rule laid down in *Neilson v. M'Gowan* (1876, 4 R. 3), because there has here been an omission on the part of the assessor which the Sheriff has power to correct. The voter was on the roll. He parted with a portion of his qualification, but retained enough to qualify him, and the assessor did not make the alteration necessary to give effect to that in his copy of the register. I think that under the 44th section of the County Voters Act there is a power given to the Sheriff to supply that omission. There seems to be a plain distinction between the case of parties who are on the roll and only change their qualification by parting with a portion of it, or in name, and those who change the subject itself." Again, in *Anderson v. Lees* (No. 12, 17 Scot. Law Rep. 167) the question arose in a similar change from proprietor to joint proprietor, a correct return having been made by the voter; but here the assessor made the change, added the word "joint," and was sustained in so doing both by the Sheriff and the Appeal Court. The case was held to fall under the preceding judgment, and the assessor was held to have acted within his right and duty.



In both *Mercer* and *Lees* it should be noticed that the fault of omission or commission was charged against the assessor, but in the case of *Anderson v. Fairgrieve* (No. 13, 17 Scot. Law Rep. 167) the fault was alleged to lie with the voter, and he was in consequence of this being held as satisfactorily established struck off the roll. He was originally joint proprietor, and returned himself duly as such; but subsequently he became sole proprietor, on discovering which, *after he had corrected the register*, the assessor put him on the valuation roll as proprietor. The Sheriff added the word "joint" to the register, but his decision was reversed (although the objection was termed by one judge a narrow and critical one) because the omission was that of Mr. Fairgrieve himself, so that section 44 of the County Voters Act could not apply, nor of course *Neilson v. M'Gowan*. Lord Mure in giving judgment said: "After the assessor has corrected his copy of the register he has no power to make further alterations. The valuation roll was still open, and he did all he could for the claimant by altering the qualification as there stated. There was no omission therefore of the assessor in the case; the omission was on the part of the voter, who should have given earlier notice of his change of qualification to the assessor. But he failed to do this." Although the case seems one of hardship, yet so long as the extraordinary regulations as to change of qualification (even where there is an *increase* in the voter's interest) prevail such a decision must almost inevitably result.

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## TREASON AND TRIALS FOR TREASON.

THE history of treason laws is for the most part recorded in the pages of the "State Trials." This record has hitherto been confined to ponderous folios inaccessible to all but a limited number of readers. Quite recently, however, the Syndics of the Cambridge University Press, under the editorship of Professor Willis Bund, have produced a selection of these trials. The work—moderate in size and price—contains not only the reports of leading cases, but really a valuable history of the law of treason from the reign of Edward III. to Charles II. It is to be hoped that the public will soon see a second volume, bringing that history down to a later date.

It is exceedingly curious to glance at the statutes passed and the trials which took place under the different reigns—to observe them swelling or diminishing in number as times were quiet or the reverse—still more curious to observe the different elements which enter into the ever-changing, ever expanding or contracting law of treason. In the reign of Edward III. is witchcraft first recognised as an overt act of treason. Religious questions appear

so early as that of Henry V., when Oldcastle is first hung as a traitor and then burned as a heretic. The extraordinary domestic arrangements of Henry VIII., coupled with the addition of Papal to his kingly powers, gave a vast scope for new treason laws and greatly multiplied the number of traitors. In his reign (as, indeed, throughout that of the succeeding Tudors) treason partook of a religious character, and the heretic was a traitor. The same fate met Protestant and Catholic alike; for to dispute the doctrine of transubstantiation, or to deny that more recent dogma of the king's supremacy, were both offences incurring the penalty of a fiery death and forfeiture of possessions to the king. This monarch was a very Janus, and fairly impartial. In his hatred of the Protestants, as is well known, he was succeeded by one daughter, while his enmity towards Catholicism descended to another.

The reign of Mary, associated though it is with all that is arbitrary and cruel, is signalized at its very commencement by a repeal of so many statutes that the law of treason has again to be sought in the Act of Edward III. But the work of building upon this foundation is speedily resumed. What an idea does the statute 1 and 2 Philip and Mary, which makes it treason to pray or desire that God would shorten the queen's days, give us of the feeling of the country! Elizabeth's reign is rendered famous by the first trial of a sovereign for treason—our own Queen of Scots. That of James is disgraced by the condemnation of a Raleigh. With Charles comes the strangest event in the long annals of treason—the king is now the traitor, and the treason is against his subjects, while under the Commonwealth it is treason to proclaim the king.

The Act of Edward III., known as the Statute of Treasons, is the foundation of English treason law. Subsequent Acts are all more or less expansions of its provisions. One king may have swept away what the fear, jealousy, or tyranny of another has added to it, but the original Act has ever stood firm as the rock. It is this statute which, introduced into Scotland by the Treaty of Union, forms now the basis of our own law as well as that of England. To the Scottish lawyer, therefore, this subject is not without interest, though we may rejoice to admit it has little practical value. We trust the days of treason trials are over for ever in this country. We feel assured at least that never again will a corrupt government be able to point to the obsequious juries of Scotland as the willing tools of their tyranny.

This statute of Edward seems to have sprung out of those conflicts between the crown and the aristocracy which at an earlier period gave rise to the Magna Charta itself. It does not necessarily follow that the nobles were actuated by any keen desire for constitutional liberty—there are more selfish motives which had probably greater influence with them. This, however, it does prove, that even at a comparatively early period powerful nobles found it necessary to make use of the machinery of the Legislature, and

sought to reform existing laws instead of resisting and defying them. We have suggested that their conduct may not have been unselfish. It must be borne in mind that not only is the law of treason the law by means of which great men have chiefly suffered, but that the greater the number of criminals declared traitors the fewer the forfeitures which fell to the mesne lords. At this time, according to Lord Hale, "the crime of treason was so arbitrary and uncertain that almost every offence that was or seemed to be a breach of the faith or allegiance due to the king was by construction and consequence and determination raised into the offence of high treason." Certain prosecutions, and in particular that of John at Hill, brought matters to a crisis, and led the Commons to petition the king "par son counsel et par les graunts et sages de la terre declarer les points de treason en c'est present Parlement." The case of John at Hill affords an excellent illustration of the evil which the barons sought to resist—the encroachment upon their own power. This man had killed a king's messenger. The feudal lord whose vassal he was held a grant *omnia bona et catalla tenentium suorum fugitivorum et felonum qualitercunque damnatorum*, but nevertheless the Court held that as they had decided the crime to be treason the goods of the criminal went to the king.

The principal provisions of this statute need hardly be mentioned here. Its chief merit lay in the check which it put upon the ingenuity of unscrupulous judges working in the interest of an unworthy king. For as regarded new treasons it provided that "if any other case supposed treason which is not above specified doth happen before any justices, the justices shall tarry without going to judgment of the treason till the cause be showed and declared before the king and his Parliament whether it ought to be judged treason or other felony." This power thus conferred on king and Parliament of declaring new treasons was certainly not neglected. Its first exercise seems to have been in the following reign of Richard, when riot was pronounced to be treason. That monarch in his conduct bears a strong resemblance to Charles I. Like him he sought to form a party and defy his Parliament, and there is the same disposition to break faith, which more than anything else brought the unhappy Charles to the scaffold. We find Richard ratifying the appointment of a commission for the reform of government, and then seeking in a series of questions to his judges to find how he could best set it aside and punish those who had devised it. The royal questions form the most remarkable memorial for counsel ever penned, and the answers which they received say little for the independence and dignity of the bench who gave them.

This proceeding on the part of the judges brought upon them a speedy revenge, from which their exalted office was not sufficient to protect them. They were arrested while in the act of administering

justice, impeached, convicted, and sentenced, although only one of their number, Chief-Justice Tresilian, was executed. Such a wholesale condemnation of the bench is an event unique in the history of the legal profession. But the judges were ultimately to have their triumph. Ten years later an Act of Parliament recited the objectionable questions and answers, and declared them to be good law. Another Act of the same year was perhaps the most conservative ever passed, viz. 21 Rich. II. c. 20, which made it treason to "procure or pursue, to repeal or reverse, any of the said statutes or ordinances made by the king and duly proved in the Parliament." It is difficult to see how a successful repeal of former statutes could ever be treason, however deadly might be the offence of the unsuccessful agitator. And in the very next reign we find the whole legislation of that Parliament, which had contemplated perpetuity, calmly swept away by an Act which, if it were treason, involved King, Lords, and Commons in the crime. We have the first of a series of relaxations of treason law which occur from time to time in English history. 1 Henry IV. c. 10, in the preamble describes a state of things so bad that there was "no man that did know how he ought to behave himself to do, speak, or say," for doubt of the pains of treason. The trials of this reign seem to establish one or two interesting points. We find two members of the Episcopal bench, an archbishop and a bishop, tried not as peers of Parliament, but after the manner of less exalted offenders. Nor in cases of treason were they allowed to plead the privilege of clergy. When the Bishop of Carlisle tried that line; the judges held that the offence with which he was charged was so great that he must plead, although, if he liked, with a protestation saving the liberties of the Church. The trials of Sir John Oldcastle, the original of Falstaff, belong to the reign of Henry V. He was identified with the earliest Protestant movement, but one which was at the same time quasi-political, and it is somewhat hard for posterity to know whether he died as a heretic or a communist.

In the well-known case of *Burdett*, which occurred in the reign of Edward IV., Professor Bund finds one of the earliest illustrations of constructive treason. "Burdett," he says, "according to the story told in all law writers, was convicted of treason for having, on being told that the king had killed his favourite white buck while hunting in his park, expressed a wish that the buck, horns and all, had been in the king's belly, thereby imagining the king's death. From the indictment the charge on which Burdett was convicted appears differently; he was indicted for treasonably compassing and imagining the death of the king, with the assistance of Stacey and Blake; and to carry out their treacherous intention they worked and calculated by art, magic, necromancy, and astronomy the final destruction of the king and Prince of Wales, and that they treasonably revealed to other persons the result of their calculations and devices, which showed that the king and the prince would shortly die."

Of how easily the law could be strained at that time to remove as a traitor a person who might prove dangerous, we have an example in the case of the Duke of Clarence, that dreamer who has been rendered immortal by Shakespeare. Part of the charge made against him consisted in an opinion which he had expressed as to the innocence of Burdett, and he seems to have been convicted upon the sole evidence of a most deeply interested witness—the king himself. The whole royal family of this period appear, it may be observed, either to have used or been the victims of magical power.

In the reign of Richard III. first appears the distinction between public and private Acts of Parliament, and henceforth we find a convenient mode of dealing out new treason law, as individual cases called for it, by means of Acts of Attainder. We have indications from time to time of a disposition to embrace under the term treason crimes of a peculiarly heinous nature, although not committed against the king or government. Thus 22 Henry VIII. c. 9, called forth by some notorious case, declared the crime of wilful poisoning to be treason, and devised a punishment for it which would be at once terrible and at the same time distinct from that inflicted on the ordinary traitor. The poisoner was to be boiled to death. Again, the statutes of this reign relating to heresy may perhaps be explained in the same way, although doubtless when Henry became Pope, heresy was necessarily treason. In no reign have there been so many enactments made touching religion. By statute power was given to the king to correct all abuses and heresies. An oath was devised wherewith to separate the wheat and the chaff, or the believers in the king from those who still clung to the Pope, and to refuse to take this oath was treason. To imagine or attempt to deprive the king of his new title as the supreme head of the Church was treason. The goods of the mild scholar who was led to dispute the doctrine of the mass were forfeited to the king as those of a traitor, while their owner expiated his heresy at the stake. Nay, it was death to teach that a priest could marry, or that private masses and the confessional were unlawful; only this was felony, not treason. How strange would it be if we had no historical records beyond the statute-book! What we may call the domestic legislation of this monarch might then form a curious puzzle. It first was treason to impugn the divorce of Queen Katherine, or cast slander upon Queen Anne and her heirs. All this was repealed when Jane Seymour took her place. It became law that Henry and Anne had never really been married, and all those who had spoken against their marriage were pardoned. "This terrible statute," writes Mr. Bund of 28 Henry VIII. c. 7, "was the greatest extension of the law of treason that had yet been made; not only were the king's subjects under the penalty of treason to swear allegiance to the king's heirs by Jane or any future wife, but also to any person the king



might leave the crown to by will. Mere obedience to the law was not sufficient; if any one refused to answer interrogatories as to their thoughts concerning the Act they were guilty of treason. . . . This Act was also an important innovation upon the principles of the criminal law. 'No one is bound to accuse himself,' 'it is the duty of the prosecutor to prove his case,' have always been maxims of English criminal jurisprudence; but under this Act all the prosecutor had to do was to ask a suspected person what he thought of the Act, and if he did not answer satisfactorily or refused to answer at all, he was a traitor." When Henry dissolved his marriage with the second Anne—she of Cleves—a new statute rendered it treason to judge or believe that his marriage had ever been valid. Then followed the attainting of Katherine Howard, and in order to protect himself and his line from naughty queens in future, it was provided that "if the king or any of his successors shall marry a woman which was before incontinent, if she conceal the same she shall be guilty of high treason, and so it shall be in any other knowing it and not revealing it to the king or one of his Council before the marriage or within twenty days after."

Amidst the many victims of Henry's tyranny no one has called forth more respect and pity from posterity than Sir Thomas More, in spite of the fact that he was indirectly a martyr for the old faith. His case illustrates forcibly how easy it was at that time to convict for treason. We associate that crime with acts of violence, plots, or at least spoken words. More's treason was strictly negative. He would not speak, and his silence was treason. While willing to swear allegiance to the successors of Queen Anne, he could not acknowledge the marriage a valid one, nor admit the king's ecclesiastical supremacy. In other words, he really perished for the opinion, to a great extent upon a point of law, which he held, and which rendered him unable with a good conscience to take this oath. The only thing favourable which can be noted concerning this case is that it was a specimen of the impartial execution of a bad law; for More was a royal favourite, and cannot fail to have been highly esteemed by all his judges. But, as the Lord Chief-Justice said when asked his opinion upon the validity of the libel, "I must needs confess that if the Act of Parliament be not unlawful, the indictment is not in my conscience invalid." From this trial we discover that it was not then beneath the dignity of a Solicitor-General to act as spy and informer. Richard Rich, who then held that office, visited the ex-chancellor in captivity to reason with him, draw him out, and afterwards depone against him. We quote from Mr. Bund: "After stating his great friendship for him, and saying he had no commission to talk to him about the affair of the supremacy, Rich put this case to More: If it should be enacted by Parliament that Richard Rich should be king, and it was made treason to deny it, what offence were it to contravene the Act? More answered, he should offend if he said no, because



he was bound by the Act, but that this was *casus levis*, he would put a higher case. If it were enacted by Parliament *quod Deus non sit Deus*, and it was made treason to contravene, would it be an offence to say it according to the Act? Rich replied: Yes; but I will put a middle case, because this is too high. The king, you know, is constituted supreme head of the Church upon earth, why should not you accept him for such, as you would me, if I were made king, by the former supposition? More answered, the case was not the same, because a Parliament can make a king and depose him, and every Parliament man may give his consent thereunto, but that a subject cannot be so bound in the case of supremacy."

This was the sum and substance of More's treason, and it was enough; for by the Act 26 Henry VIII. c. 2, the refusal to take the oath to maintain the king's supremacy was treason. At his trial the accused pleaded that to avoid offence he had kept silence as to this Act, and that law can only punish for words and deeds. But the answer which the Attorney-General gave was, "Sir Thomas, though we have not one deed or word of yours to object against you, yet we have your silence, which is an evident sign of the malice of your heart, because no dutiful subject being lawfully asked the question will refuse to answer it."

The trial of Anne Boleyn is remarkable as one of the few specimens of a charge of treason brought under the second section of the Act of Edward III., viz. that which constitutes it treason to violate (or rather to have criminal intercourse with) the king's companion. It is to be regretted that the evidence led at this trial has not been preserved, so that we are not in a position to say whether the queen was really guilty of the offence charged or had merely ceased to please the royal fancy. One of the co-respondents, Smeton, pleaded guilty, but his confession could be no evidence against the queen, and yet it was read at her trial. It is said that an acquittal was expected owing to the ability with which she conducted her defence; but all the peers found her guilty. The sentence was an alternative one, and therefore of doubtful legality. She was to be burned or beheaded "as shall please the king." There is a mystery about the queen's confession to Cranmer. She then alleged, it is said, some impediment which rendered her marriage with the king *ab initio* null, and so the sentence pronounced. "The consequences of this sentence," as has been remarked by Mr. Bund, "declaring that Anne was never the king's wife, do not seem to have been perceived at the time. It has long been settled law that the clause in the statute of Edward III. only applies to the wife of the king, not even to a queen-dowager; hence if no marriage ever took place between Anne and Henry, the queen and other prisoners, whatever might be their guilt, were not legally guilty of treason within the statute of Edward III."

We have already said that the reign of Mary was marked by a repeal of the treason statutes of her father. This was only to be expected. Several of them must have been peculiarly obnoxious to her, true daughter of the Romish Church as she was, and in her eyes More must have been a martyr. The statute 1 Mary, c. 1, proceeds thus in a very literal strain: "Forasmuch as the state of every king, ruler, and governor of any realm, dominion, or commonalty standeth and consisteth more assured by the love and favour of the English towards their sovereign, ruler, and governor, than in the dread and fear of laws made with rigorous pains and extreme punishment for not obeying of their sovereign, ruler, and governor. And laws also justly made for the preservation of the commonweal without extreme punishment or great penalty, are more often for the most part obeyed and kept than laws and statutes made with great and extreme punishments, and in special such laws and statutes so made whereby not only the ignorant and rude unlearned people, but also learned and expert people, minding honesty, are often and many times trapped and snared, yea, many times for words only, without other facts of deeds done or perpetrated."

And yet during her reign, as we all know, neither block nor stake were idle. A statute of Edward VI. had introduced an important change in the law of treason by rendering it necessary that a conviction should proceed upon the testimony of "two lawful accusers." But by an Act of Philip and Mary it was provided that trials of treason should be had in accordance with the course of the common law. Notwithstanding a division of opinion amongst eminent lawyers as to the effect of this statute viewed as a repeal of that of Edward VI., it was practically treated as such and treason trials conducted in the old way. It was held in the case of *Thomas*, one of the cases which occurred in Mary's reign, that "of his accusers, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may be an accuser," that is to say, that there is no distinction between direct evidence and hearsay—a strange decision, all Scottish lawyers must hold.

The attempt to prevent by force the marriage of Mary with Philip led to a number of trials for treason. That of Throckmorton, which took place before a special commission at Guildhall, London, affords a curious specimen of the kind of justice then dealt out. Before the jury were sworn the Attorney-General took the list to one of the judges well acquainted with the citizens and got him to mark objectionable men to be challenged. The proceedings therefore began with what was supposed to be a jury loyal and ready to convict. The prisoner was however urged by the judge to confess, and told it would be better for him. The evidence against him seems to have consisted entirely of the confessions of others in the same condemnation, and when he asked

that the statute regulating treason trials should be read, he received an answer which reminds us of that given by the Pharisees in the Gospel, "It appertaineth not for us to provide books for you, neither sit we here to be taught by you." The jury in this case did a thing almost unprecedented in the annals of treason trials up to that time—they returned a verdict of not guilty, whereupon they were thus addressed by the Chief Justice: "Remember yourselves better; have you considered substantially the whole evidence laid against the prisoner? The matter doth touch the queen's highness and yourselves also, take good heed what you do." The jury stuck to the verdict, and for doing so eight of their number were afterwards fined by the Star Chamber, three of them in £2000 each. The Court were obliged to order the discharge of the prisoner, but at the same time directed the Lieutenant of the Tower to take him into custody again as there were other matters to charge him with. "The treatment of the jurors had," says Mr. Bund, "its effect. Sir Nicholas' brother, Sir John Throckmorton, was tried shortly after upon the same evidence and convicted."

The fact that Cranmer was ultimately dealt with for heresy, and has earned a somewhat questionable title to rank with the martyrs in the Church of England, is apt to make us overlook another fact in his career, viz. that he had been first tried and condemned as a traitor. His offence lay in having signed the Letters-Patent issued by Edward VI., in terms of which the Crown of England would have gone to Lady Jane Grey.

In addition to the statutes passed, treason and heresy were sought to be checked by means of royal proclamation, which declared those rebels and liable to martial law who possessed treasonable or heretical works and did not at once burn them without reading or showing them to any person. In Mary's reign torture, though illegal, seems to have been frequently employed, and the confessions thus obtained used against the prisoners at their trials.

It is, we fear, only due to Protestant prejudice that while the epithet "bloody" has been so generally applied to Mary, it has been withheld from her sister Elizabeth, whose reign, however brilliant it may have been in some respects, is nevertheless stained with many a foul crime committed under the sanction of unjust laws unfairly administered. In the suppression of the northern rebellion Lord Sussex, acting upon instructions, executed 600 or 700 peasants, stating, however, in his report that he had been scrupulous not to "include any person that had any inheritance or wealth, for that he knew the law." At York three men were recommended to mercy "because, their estates being settled on their wives, if their lives were spared the queen would have their lands during their lives, while if they were executed their wives would be entitled to them." In one case the brother of a traitor was attainted because he had some interest in the lands of the

latter, and thus the queen's title might have been prejudiced. Act after Act was passed imposing cruel heart-searching oaths upon tender consciences, and so sweeping in their nature as to render every honest adherent of the old faith who was a commoner liable to imprisonment and even death. But here we have perhaps the most striking illustration which history affords of class legislation. For the Act 5 Elizabeth, c. 1, which ordained all persons to take an oath renouncing the Pope's authority and accepting the queen's—to avoid the strong opposition of the House of Lords—contained this saving clause, "that the queen was otherwise sufficiently assured of the faith and loyalty of the temporal lords of the High Court of Parliament; therefore the Act should not extend to compel any temporal person of above the degree of a baron of this realm to take or pronounce the oath, nor to incur any penalty limited by this Act for not taking or refusing the same." The queen and her Government must have known well that they had no such assurance; that, on the contrary, nobles, powerful nobles, were at the head of the plots which threatened the peace of the country. Indeed one of the first great treason trials of the reign was that of the Duke of Norfolk, to which we shall now direct the attention of the reader, as it is a striking instance of the kind of justice dealt out to a dangerous prisoner whose conviction it was deemed expedient to secure. The duke was tried before a commission presided over by the Lord High Steward, and composed of members of the House of Lords along with the judges. Four eminent counsel appeared for the Crown, but professional assistance was refused to the prisoner even upon questions of relevancy, although he pleaded that he had had short warning and no books. Two principal charges were brought against him, viz. a conspiracy to depose the queen and assistance given by him to the rebels against her Government. He pleaded not guilty. In support of the first charge it was alleged that against the express orders of Elizabeth he had sought the hand of her rival the Queen of Scots in marriage, although he knew that she laid claim to the throne of England. After a tirade by way of an opening speech explaining the indictment by the learned Sergeant Barrham, the duke was asked to confess whether or not he knew of Mary's claims to the throne. This he declined to do, and the Lord Steward was asked to make him answer ay or no. Thus pressed, he admitted that she claimed it under certain circumstances. This did not satisfy the learned prosecutor, who said, "Answer plainly, did you know it or not? if you say No, we can prove it." "Norfolk," to quote Mr. Bund's abridgment of the trial, "protested that he was being hardly handled; that they wanted to trap him by circumstance, and infer upon him that Mary was the queen's enemy, and so make him out a traitor. He offered to answer directly to the whole of his dealings with her. Barrham required an answer to the facts as they fell out, Did you know that she claimed the present

possession of the Crown? That she usurped the arms and royal style of this realm? That she made no renunciation of that usurped pretence? If you say you did not know it, we will prove every part of it." Surely it is difficult to conceive anything more unjust than this curious mixture of the English and French system. A plea of not guilty is taken, and yet at various stages of the proceedings the unfortunate prisoner is assailed with questions—threatened with proof, the necessity for which it is at the same time suggested he might obviate by a convenient confession. Here we have a process of moral torture prolonged during the trial itself. The evidence brought against the duke consisted mainly of the written confessions of persons who were themselves implicated. They were not brought into the Court to be confronted with the prisoner and cross-examined by him. That was held to be unnecessary in the case of treason. The duke took what may seem to us a curious objection to one of these witnesses, the Bishop of Ross, Queen Mary's secretary. He pleaded that he was a Scot. "A Scot," said Barrham, "is a Christian man." And another counsel observed, "It was strange if Scots could not be witnesses. If so, a man might commit treason, and if he only mentioned it to Scots, he could not be punished." When it was proposed to put in the confession of another witness—Bannister—we have the quaint remark from the duke that Bannister was shrewdly cramped when he told that tale. It was denied that torture had been used; but the request to produce the man himself, and bring him face to face with the prisoner, was not complied with. Thus upon such miserable and unsatisfactory evidence was one of the most illustrious peers of the day convicted and executed. In fact in those glorious times of the "bright Occidental Star," all that was necessary to condemn a great man was to seize a few of his retainers, put them on the rack, note down their ravings, produce them in Court, and crave for sentence.

The case of Dr. John Story is of interest owing to the somewhat romantic circumstances under which he was brought to trial. He was an English refugee whose concern in the acts of Mary had made Protestant England an inconvenient residence, and he had gone into the employment of that faithful son of the Pope, the Duke of Alva, who appointed him a searcher for heretical books at Antwerp. He was captured in rather an ingenious fashion. Another refugee, who was really a spy of the queen's Government, told him of an English ship in the Scheldt which contained a quantity of heretical works, and tempted by the prospect of a prize, he went on board with his false friend. Once within the English vessel no time was lost in setting sail, and Story was soon a prisoner in London. We are sorry to say, for the credit of the Government, that this aged man was forced to endure the agony of the rack prior to his execution, although he may have been in the position to say with Adonibezek, "As I have done, so God has requited me." His trial



raised one point of interest. He was charged with having lived contrary to his allegiance abroad, and when called to plead he denied that he was an English subject, having taken an oath of allegiance to the King of Spain. "A long argument, or rather wrangle," says Mr. Bund, "took place between him and the judges," he saying that they were not his lawful judges, and had no power by law to proceed against him, as he was not an English subject. The judges asked Story where he was born: he said in England. They therefore said that it followed of course that he was subject to the laws of England, and owed obedience to Elizabeth. He replied, "God ordered Abraham to go forth from the land and country where he was born, from his friends and kinsmen, into another country, and he had followed Abraham's example for conscience' sake in religion, had forsaken his country, this realm, its laws, and its prince also, and had wholly given himself up to the service of a foreign governor, King Philip of Spain." His plea, we need hardly say, was repelled, and his case continued for centuries to be an authority upon the question whether it is possible to get rid of allegiance. One of his judges had the brutality to show him from a book what the sentence of treason consisted in, and to ask him how he liked it, when the poor man replied, "God have mercy on me!"

By far the most interesting trial in the reign of Elizabeth is of course that of Mary Queen of Scots, but this we may consider in a subsequent paper.

W. G. S. M.

## DEVOLUTION IN ARTICLES OF ROUP.

It is a remark not unfrequently made by members of the profession that questions of law which seem the most likely to have arisen for decision are precisely those upon which it is most difficult to find authority. Whether it is that such likely questions never, as matter of fact, do arise, or that, having arisen, no one considered it worth while to obtain a judicial opinion upon them, it would be difficult to say. Our purpose here is not to pursue an inquiry upon this subject (which might be interesting, but certainly would be profitless); it is rather to call attention to the fact, which otherwise might escape notice, that in connection with a recent case before the Second Division of the Court, one of these seemingly plain yet hitherto unsettled questions arose and was decided—although not by the Court—finally, so far as the litigants in that particular case were concerned, and, in our opinion, satisfactorily so far as regards the law itself.

The question to which we refer was this: Whether the exposers of a property for sale by public roup are entitled, after having called upon the second highest offerer to grant bond for the price



in terms of the articles of roup, to revert to the highest offerer, not for damages be it observed, but for specific implement of the purchase. For nearly a century it has stood settled law that where the exposers intimate a devolution of the property to the second highest offerer, the highest offerer cannot then step in and claim the property. The reason is plain. The second highest offerer having been called upon to fulfil his part of the agreement, has thereby acquired a right to demand reciprocal performance. But the question so long ago settled as between offerers had never apparently presented itself as between exposers and offerers, until it came to form the subject of anxious discussion and very careful judgment in the recent case of *Mackenzie v. The Alliance Heritable Security Company (Limited)*, not yet reported.

Briefly stated, the facts of that case are these. In the end of July 1878 the Alliance Heritable Security Company exposed for sale by public roup certain property in Glasgow. Mackenzie was the highest offerer at the sale, and to him the property was knocked down. Wilson was the second highest offerer. In terms of the articles of roup the purchaser was bound (1) within five days to pay £100 to account of the price, and (2) within six days to grant bond for the balance. If the purchaser failed to grant bond, the exposers might, within twenty days after the sale, devolve on the second highest offerer. Mackenzie, the highest offerer, did fail to grant the requisite bond, and the company thereupon made notarial intimation of the fact to Wilson, the second highest offerer, and called upon him to grant bond for the price he had offered, at the same time reserving all their claims against Mackenzie under the articles of roup and minutes of sale. Ultimately, when the date arrived at which, in terms of the articles of roup, the price was payable, the company recorded the articles and gave Mackenzie a charge for the sum offered by him. He suspended; but the Lord Ordinary (Young) found the charge orderly proceeded. Against this decision Mackenzie presented a reclaiming note to the Second Division. There advantage was taken of the clause of reference in the articles of roup, and the whole proceedings were directed to be laid before Professor Robertson of Glasgow, the arbiter named in the articles. The interlocutor pronounced took the form of a remit to Professor Robertson "to decide finally on the plea stated for the complainer, rested on the alleged devolution of the purchase in question on the second highest offerer at the sale, and to report *quam primum*."

The learned arbiter, after hearing counsel, found in favour of Mackenzie, on the ground that the exposers had exercised their option to devolve the property on the second highest offerer. The following very clear and instructive note accompanied the arbiter's report:—

"It may be satisfactory to the parties if I now state the grounds on which the preceding finding is rested.

"On the failure of Mr. Mackenzie to grant bond, only one of three

courses was open to the exposers—with, however, the option of electing which of them should be taken, viz. :—

“(1.) They might have held Mr. Mackenzie bound to implement his purchase.

“(2.) They might have declared his interest forfeited, and have either retained the property or re-exposed it.

“(3.) They might have devolved the property on Mr. Wilson as second highest offerer.

“The third of these courses was the one actually taken; and the question for determination is whether, having taken that course, and found it unsuccessful, the exposers may, as now desired by them, revert to Mr. Mackenzie, and hold him as the purchaser?

“At the discussion before me it was argued on the part of the exposers—(1) that the notarial requisition served on Mr. Wilson did not amount to a devolution; and (2) that even assuming it to amount to a devolution, it must be taken along with the qualification or reservation attached to it—the effect of such qualification or reservation being, it was said, still to retain Mr. Mackenzie bound as purchaser.

“With regard to the first of these points, if the notarial requisition was not meant or intended to be a devolution, I must frankly confess myself wholly at a loss to conceive the object or the purpose for which it was served. Mr. Wilson was either to be regarded as the purchaser or he was not. If he was not to be regarded as the purchaser, then clearly the exposers were absolutely without right or title to require him to grant bond. In this view the requisition was, to say the least of it, an improper proceeding. On the other hand, if Mr. Wilson was to be regarded as the purchaser, then the right of the exposers to require him to grant bond was clear and undoubted. When, then, they called upon him to grant bond, their requisition to that effect necessarily implied that he had been accepted as purchaser. It is true that the requisition does not say, in terms, that the sale was devolved; but looking to the language actually employed, I hold that the requisition was just as effectual to devolve the property on Mr. Wilson as if it had contained express terms of devolution.

“With regard to the second point maintained by the exposers—viz. that even assuming the requisition to amount to a devolution, the devolution must be taken subject to the reservation by which it was accompanied—let us now see in what terms the reservation is expressed. The clause runs as follows: ‘And that without prejudice in any manner of way to the claims of the said company against the said George Mackenzie under the said articles and minutes of sale, which shall remain and subsist to all intents as if this intimation had not been made to you.’

“This leads me to inquire what were the claims competent to the exposers under the articles of roup. As regards the minutes of sale, they contain, of course, nothing but the offers.

"The fourth article provides that in the event of the person preferred to the purchase failing to grant the stipulated-for bond, he should, in the option of the exposers, not only forfeit his interest in the purchase, but also be liable to the exposers in one-fifth part of the price offered by him in name of damages. Further, and after providing for the case of devolution, it provides, 'that nothing herein contained, particularly the exercise of the said option on the part of the exposers, shall deprive the exposers of the right to sue the offerer preferred to the purchase, and the other offerers on his default, or any of them, for the said sum of £100 stipulated to be paid by the offerer preferred to the purchase within five days after the roup, even although they should elect to expose the subjects of new to sale, to hold the same themselves, or to declare them to belong to the immediately preceding offerer; or to hold and apply for their own behoof the said sum of £100, if the same shall have been paid, in name of liquidate damages, if the sale shall not be completed within twenty-one days after the said 11th November 1878, which they are hereby authorized to do.' Moreover, the offerers bound themselves to fulfil their respective parts of the premises under a penalty of £500, over and above performance.

"These were the only claims authorized or contemplated by the articles of roup. They may be summarized thus—(1) one-fifth part of the price offered; (2) forfeiture of the £100; and (3) a penalty of £500, whatever the value of that penalty might be.

"It was, of course, perfectly competent for the exposers to reserve full and entire all their claims against Mr. Mackenzie. But I take it to be clear that they had no right whatever to go beyond claims neither authorized nor contemplated by the articles of roup. If they went beyond the claims so authorized or contemplated, then they were importing into the transaction new terms, new conditions, of their own making; terms and conditions to which Mr. Mackenzie had never agreed to become a party; terms and conditions which they are not now entitled to impose upon him. This being so, the notarial requisition falls to be read as reserving only such claims as were authorized or contemplated by the articles of roup—in other words, claims for damages in respect of non-implement.

"It was further argued on behalf of the exposers that in order to the completeness of the requisition as a devolution, some act of acceptance on the part of Mr. Wilson was necessary, and that inasmuch as there was no such acceptance the devolution is without proper legal effect—in other words, that there has truly been no devolution, and consequently that Mr. Mackenzie still remains the purchaser.

"This view I take to be entirely erroneous. In order to constitute a valid contract of sale simple offer and simple acceptance are sufficient. The one party offers to buy or to sell, as the case

may be, and the other accepts. In our law there is no such rule as this—that in order to constitute the contract of sale—in order to make the transaction binding on both parties—another step is needed, viz. an acceptance by the offerer of the acceptance given to his offer.

“In the present case, then, the requisition served on Mr. Wilson was truly the acceptance of his offer—and the moment it was served the contract of sale between the parties was complete. Of course it was another question whether Mr. Wilson would be able to implement his part of the transaction.

“The view which I have just been expressing, viz. that the requisition served on Mr. Wilson was truly the acceptance of his offer, derives ample confirmation from the opinions of two of the judges in the well-known case of *Hannay v. Stothert and Others*, March 8, 1788, as reported by Lord Hailes, vol. ii. p. 1046. In that case, the particulars of which are to be found in Morison's Dictionary, p. 14194, one of the conditions was to the effect that if the highest offerer failed to find security within thirty days, the purchase should devolve on the next highest offerer. The highest offerer having failed to find security within the specified period, intimation was made by the common agent in the sale to the next highest offerers. In a question between the highest offerer on the one hand and the next highest offerers on the other, it was held that the latter by having been called on to perform *their* part of the agreement had thus acquired *a positive right to demand reciprocal performance*.

“One of the judges to whom I have referred—Lord Eskgrove, afterwards Lord Justice-Clerk, and famous as a feudal conveyancer—expressed himself thus: ‘The condition, being made absolute, is in favour of the creditors’ (*i.e.* the exposers); ‘and therefore they are not bound to insist against the prior offerer’ (*i.e.* the next highest offerer), ‘but the prior offerer may insist by protest to be relieved. Here the creditors *pass from* the last offerer, and *require the prior to stand to the bargain*. What defence could the prior offerer have? *None.*’ This language, if it means anything, clearly means this—that if the prior offerer neither had nor could have any defence, the reason simply was that the requisition made upon him was the acceptance of his offer, and that such acceptance completed the contract of sale, and constituted him the purchaser of the property. He was then vested with a positive right to demand reciprocal or specific performance; and the existence of this right in his person necessarily excluded not only any right in the highest offerer to demand specific performance, but also any right on the part of the exposers to require specific performance from the highest offerer.

“The other judge referred to—viz. Lord Braxfield, afterwards Lord Justice-Clerk, and also famous as a feudal conveyancer—said, ‘By the lapse of thirty days, or of any other stipulated time,

there is no *jus quæsitum* to the prior offerer, for the stipulation is in favour not of him, but of the creditors. When, however, the creditors say that they are not willing to rely on the personal security of the last offerer, but, on the contrary, *require* the prior offerer to find caution within ten days; *there the prior offerer is bound, and the transaction is finished.* Is it necessary to add that if the prior offerer is bound as purchaser, and the transaction is finished, the highest offerer cannot possibly be regarded as purchaser, or be called upon to take the property, however liable he may be for damages?

“The only difference between the case of *Hannay* and the present case is—that there the question was one between two sets of offerers, whereas here it is one between the exposers and an offerer. This difference, however, is of no moment, for the judgment in *Hannay* turned upon the fact that in respect of the devolution the second highest offerer had acquired a positive right to demand reciprocal performance. Now, if in a question between two sets of offerers the obligation of reciprocal performance was recognised, not the less does it fall to be recognised in a question between the exposers on the one hand and an offerer on the other.

“It was likewise maintained on behalf of the exposers that the sale to Mr. Wilson was not an absolute or unconditional sale, but a sale contingent or conditional on his granting the wished-for bond—the inference sought to be drawn from this argument being that until a bond was granted, the condition on which Mr. Wilson was to become the purchaser had not been fulfilled, and consequently that Mr. Mackenzie still remained undivested of his character of purchaser. I am not at all prepared to say that the sale was not a conditional one; indeed, this may be admitted—I mean as regards Mr. Wilson, for in the event of his not granting bond within the specified period, it was in the option of the exposers either to hold him to the contract, or to insist upon damages in terms of the articles of roup. In all this, however, there is, as I think, nothing to impair either the fact of devolution having taken place, or the result involved in that fact, viz. the liberation of Mr. Mackenzie from the purchase of the property. That liberation is not necessarily, nor indeed in any way, connected with or dependent upon the purification or non-purification of the condition on which Mr. Wilson was to become the purchaser. It is a matter which stands by itself, and which falls to be determined by the fact that—to use the language of Lord Eskgrove—the exposers had ‘*passed from* the last offerer.’ Of course instead of passing from Mr. Mackenzie, they might have held him to the contract of sale. But they exercised their undoubted option of declaring his interest in the purchase forfeited—in other words, they *annulled* the contract of sale as between him and themselves—except, of course, as regards their claim for damages. And having so acted, they are now met with a plea which is perfectly applicable to the circum-



stances, and which I take to be unanswerable, viz. that inasmuch as *they* are free, *he* also is free, for the rule of law is that both parties must be bound or neither. J. R."

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## LORD JUSTICE BRAMWELL ON ACTIONS OF NEGLIGENCE

(From the "*Solicitors' Journal*.")

THE recent case of *Lax v. The Corporation of Darlington* (28 W. R. 221, L. R. 5 Ex. D. 28) afforded an opportunity to Lord Justice Bramwell for giving fresh expression to his well-known views on the subject of actions for negligence. No one who has had much opportunity of hearing or reading what the learned Lord Justice has at various times said in relation to such actions can be ignorant of the turn of his thought on this subject. There is a now famous dilemma which he put in a case where a man injured himself by falling over something in an insufficiently lighted station. "If it was too dark for the man to see, he had no business to go there. If it was light enough for him to see, he had no business to tumble over the obstacle." There is no kinder-hearted judge on the bench than the Lord Justice, but his sense of justice and reason has always revolted against allowing sentiment to affect the decision in actions of negligence when brought against public bodies or wealthy defendants. The tendency of juries in the case of railway companies is to make them as nearly as possible insurers of the passenger, even against the effects of his own precipitation and carelessness. Things that no one would dream of treating as negligence in the case of ordinary individuals are treated as negligence in the case of companies. The truth is that juries will continually find against the evidence as to whether there has been negligence, and the power of the courts to set them right is necessarily limited. It is no use ordering new trials when the jury is sure to find the same way, and so the whole standard of what constitutes negligence gradually becomes warped. Take this example of facts that would infallibly result in a verdict of negligence against a railway company. A flurried old person at a bustling junction cannot find out his or her train till the last moment, and wants to get in just as the train is being whistled out of the station. A porter runs up; he wishes to do the best he can for the passenger; there is no time for much deliberation, and so he bundles the old person into a carriage; the old person gets his or her thumb shut in the door, and hence arises the class of case known as a thumb case. Now we should be very much disposed to think that this ought to be regarded purely in the light of an unfortunate accident for which no one can be said to be to blame. Negligence ought to imply something, of whatever degree, in the nature of moral delinquency. The porter in the case we put is



really doing the best he can do under the circumstances. He knows that the train, though not actually started, will start in a moment. If it had actually started, his duty would be to prevent the passenger from getting in, though, in such cases, passengers are always assenting parties to being got in. He thinks there will be just time, with his assistance, for the passenger to get in, and this the passenger is eager to do. It is a choice of evils, an emergency, and he does his best. We cannot see that the passenger has any real reason to impute negligence to the porter. This may be taken as a typical case. It would almost require a porter to attend to every passenger who comes into a station to satisfy the duties which, according to counsel for plaintiffs in such cases, are incumbent upon a railway company.

But, notwithstanding these considerations, we think Lord Justice Bramwell, in his revolt against the injustice that is often done to companies in these actions, sometimes tends too strongly in the opposite direction. The class of cases in which the learned Lord Justice has expressed the strongest views in favour of the defendants in actions of negligence are cases in which, though there is some amount of negligence or default on the part of the defendants, the plaintiff's voluntary act has also conduced to the mischief. For instance, in platform cases, if the plaintiff did not get out, the company's negligence could not produce personal injuries. The suggestion, therefore, was that the "*per quod*" failed to be proved. To meet that, the doctrine of "invitation to alight" was devised, and every reader of law reports knows into what subtleties that class of cases has carried the law of negligence. We should wish to regard this class of questions with some breadth of view. It seems to us that the real question is whether if no mischief would have followed the defendants' negligence without an intervening act on the part of the plaintiff, done by the plaintiff with full power of estimating the risk he was running, there can be liability on the part of the defendants. We strongly suspect that the learned Lord Justice would answer this proposition in the negative, and we admit that at first sight there are strong grounds in reason and logic in his favour. He says, commenting upon the well-known case of *Clayards v. Dethick* (12 Q. B. 439), "It was there asked, 'Was the cabman bound to stay in all day?' Bound to whom? A person being bound, supposes his being bound to somebody. It is an inaccurate expression. One does not care about words except when they mislead. The expression 'bound' was used there. Why, of course, he was not bound, because there was nobody to say to him 'you shall.' But if he chooses to go out with an obvious danger before him, he must take the consequences. Suppose a man is shut up in the top room of a house unlawfully, is he bound to stay there? He is not bound to do anything of the kind. He may jump out if he likes to run the risk of breaking his neck or his limbs; he may let himself down by a rope or ladder, but if he runs the risk of

defendants for the inconvenience or restriction of lawful right which they might suffer through the defendants' negligence or breach of duty. A man has a right to go on the footpath. If the only remedy for swinging bales in a negligent manner over it was an action for nuisance in respect of the damage occasioned by having to go a little distance into a muddy roadway, the owners of adjoining warehouses might, practically speaking, hoist bales over the footpaths in the most negligent manner with impunity, and the right of the public to use the footpaths in safety would be practically a nonentity. So, if a passenger in a train pulled up beyond the platform must go on to the next station, and bring his action for damages for so being carried on, in a vast majority of instances his remedy would be not worth pursuing. We might multiply illustrations of this *usque ad nauseam*. We fully admit that juries are constantly going wrong in their findings both as to the existence of negligence and the non-existence of contributory negligence; but we are not convinced by the learned Lord Justice's reasoning as to the unsoundness of the views which he combats. It seems to us to be generally expedient that a person towards whom there has been a breach of contract or duty should be entitled to recover in respect of damages which it may be reasonably contemplated he would incur by reason of such breach of contract or duty, even when immediately caused by his own intervening action; but it is quite right that his title to recover should be limited by the countervailing proposition that when the damages cannot reasonably be looked upon as the result of the breach of duty or contract, he should not recover—as, for instance, when they are caused by an intervening act of his own of a reckless or unreasonable character. An act of negligence or breach of contract which, through the intervening action of the party injured, causes injury, ought to give a right of action where such intervening action is that which a prudent and reasonable man would regard as a reasonably safe course of action. In such case the damage may fairly be said to spring from the negligence or breach of contract. But when the negligence or breach of duty but for the unreasonable or negligent action of the party injured would not have occasioned the injury, there should be no right of action, as the damage cannot fairly be said to have arisen from the defendant's act or default. This is, in truth, nothing more than the ordinary doctrine with regard to contributory negligence.

On consideration, we feel inclined (with due submission) to defy the learned Lord Justice to escape from the "prudent man" test that he so much objects to. It enters into almost every case, except where the injury is the direct result of the defendant's act. In every case where intervening action of the plaintiff is a necessary condition of the damage resulting from the defendant's negligence, you must consider the character of the plaintiff's intervening action. To take a case at random. A surveyor of highways

leaves a great heap of stones in the middle of a road. A person driving along on a dark night comes to grief in consequence. He need not have driven along in the dark. You must consider whether the act of driving along in the dark was prudent, and whether the pace at which he drove was prudent under the circumstances, and so forth. Some may say the case is obvious, but this is a mere matter of degree. If you must consider the prudence of the intervening action in one case, you must in all. It may be said that the public enjoyment of the right of transit on roads at night would be greatly interfered with by the negligence of road surveyors, if everybody driving at night was bound to take all risks. We say that precisely similar considerations, though perhaps in different degrees, apply to the cases of persons injured by platform accidents, or by bales falling on footpaths. The question whether a man is the author of his own wrong, or can be said to be damaged by the fault of another, must depend on the relation between the conduct and actions of both parties, which may vary in each particular case, and we believe that it must generally be determined by considerations substantially the same as those so forcibly criticised by Lord Justice Bramwell, though they may be capable of more accurate modes of expression than those with which he finds fault. We see no medium between this conclusion and the conclusion that no person can ever recover in an action of negligence where his own intervening act in incurring risk has conduced to the injury. Such a proposition seems to us to be contradicted by hundreds of decided cases, and to be contrary to the obvious principles of expediency.

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## INJURIES TO CHILDREN—THE RULE OF IMPUTED NEGLIGENCE IN ENGLAND AND AMERICA.

*(From the "Southern Law Review.")*

IN actions for this class of injuries, it is necessary to consider several essential particulars: 1. The age and capacity of the injured child; 2. Whether the court having jurisdiction of the action will apply what is technically known as the rule of "imputed negligence;" 3. Whether the action is by the injured child, or by its parents, for loss of service, expense of medical treatment, or for a statutory penalty in case of death; 4. The circumstances of injury.

*I. Age and Capacity of the Child.*—When it is clearly established that a child's infirmities of age or intellect are such that it has no capacity for distinguishing between circumstances of danger and safety, or avoiding the one in preference to the other,

the court will, as a matter of law, pronounce it *non sui juris*, and therefore personally incapable of contributory negligence. When its incapacity does not clearly appear, it is a proper question for the jury whether the child is *sui juris*. On the other hand, when it is evident that the child is capable of caring efficiently for its safety, the court will, as a matter of law, pronounce it *sui juris*.

Thus it has been held as a matter of law that children of the following ages are to be regarded as *non sui juris*: One year and five months, two years, two years and four months, two years and nine months, three years and seven months, nearly four years, four years, under five years, five years, six years, and, it would seem, even seven years. But this question was decided by the jury in cases of children of the following ages: Ten years, eight years, nearly seven years, six years and seven months, six years, five and one-half years, five years, and even four years and seven months. However, a boy nearly eleven years old, active and intelligent, has been pronounced by the court capable of taking care of himself upon the street.

When the age of the child is such that it is close upon the dividing line between that class of children whom the court will pronounce *non sui juris* and that which is relegated to the decision of the jury, it is not surprising to find testimony that the child is one of more than ordinary intelligence and activity, or possessed of discretion in advance of its years and size; for it being established that the child is capable of appreciating danger and avoiding it, the parent will not be subject to the charge of negligence in allowing it to go at large with a certain degree of freedom.

*II. The Rule of Imputed Negligence—Hartfield v. Roper.*—The rule which imputes the negligence of the parents of children, or the custodians of other persons *non sui juris*, to their respective charges found expression in this country for the first time in the case of *Hartfield v. Roper*, and twenty years before it received the sanction of the English courts.

It was resolved in *Hartfield v. Roper* that where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by its parents to be in a public highway, without any one to guard it, and is there run over by a traveller and injured, neither trespass nor case will lie, unless the injury be "voluntary" or the result of "gross neglect" on the part of such traveller. In an action for such injury, if the conduct of the child be such as would constitute negligence on the part of an adult, although the child, by reason of its tender age, be incapable of using that degree of care which is expected of a person of prudence, the want of such care on the part of parents or guardians of the child furnishes a complete defence to an action by the child for the injury sustained.

A single extract from the opinion of the court will be sufficient to present the grounds of the decision. Said Cowen, J.: "An infant is not *sui juris*. He belongs to another, to whom discretion

in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect."

(1.) *Comments upon Hartfield v. Roper.*—That the learned justice, in casting about himself for some legal principle upon which to base this rule, should have hit upon that of agency, was exceedingly unfortunate, as has been frequently remarked. There is nothing whatever in the relation of parent and child which is in the slightest degree analogous to that of principal and agent. It is as fair to say that the child is the agent of the parent as *vice versa*, perhaps more so; for, in certain cases, the child may bind the parent. Persons *non sui juris* are wholly incapable of appointing an agent. To say that the law will imply this relation under the circumstances is to beg the question. It is foreign to the idea of agency that the principal should be subject to the control of the agent. The order is the reverse. Contrary to the general rule of agency, it is noticeable that the authority of this "agent" is delegated with the utmost facility. Thus, in jurisdictions which recognise the rule of imputed negligence, it matters not whether the temporary custodian of the child be the parent or otherwise. The negligence of any person in whose care the child is placed by parental authority is imputed to the child. The non-feasance or misfeasance of an agent, in matters pertaining to his trust, subjects him to an action by his principal; then, upon this supposition of agency, if the child has suffered through the dereliction of the parent, he is clearly responsible in an action by his offspring. The first case of this kind is yet to be heard of. As well might the father be made to respond in damages to the child for the imperfect healing of a broken limb through want of proper surgical attention. Every application of the well-known tests of the relation of principal and agent is a *reductio ad absurdum*.

The truth is, that this is a simple matter, which is made complex by the introduction of a consideration entirely foreign to it. The parent owes the child a variety of duties, which are as natural as they are legal, particularly the duty of protection. Upon this ground it might reasonably be held that in actions for injuries to the child, caused by the concurrent negligence of the defendant and the parent, person *in loco parentis*, or having authoritative control of the child, the *identity* of the child with either of the foregoing prevents a recovery. And, in the judgment of the writer, the application of the rule of imputed negligence should be limited strictly to cases in which this identification is *complete*.

(2.) *The English Rule—Waite v. North-Eastern Railway Company.*—This is well illustrated by the leading and only case on the subject in the English reports, the facts of which were, that the plaintiff, a child five years old, was in charge of its grandmother, who procured tickets for both at a railway station, with



the intention of taking the train at that place. The pair, in crossing the line, for the purpose of reaching a platform on the other side of the station, opposite the ticket-office, were run down by a train, under circumstances (as the jury found) of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the plaintiff received personal injuries for which the suit was brought. Lord Campbell, Chief-Justice, in delivering the judgment of the Court of Queen's Bench, expressly repudiated the notion that the person in charge of the plaintiff might be considered as his agent. He based his opinion upon the fact of identification of the elder person and her charge, saying, "A complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old, to be carried in a nurse's arms."

This view prevailed also in the Court of Exchequer Chamber, on appeal. The judges, it is true, quite generally based their opinions upon the ground that the action was for a breach of duty arising out of the contract of carriage made with the person having the plaintiff in charge; but Williams, J., seems to have put the matter on the proper foundation when he expressed the view that what was resolved in this case would be true, generally, in the absence of all contract relation whatsoever. Said he, "The person who has the charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which, by the exercise of reasonable care, he might have avoided, it would be strange to say, that though he himself could not maintain an action, the child could."

(3.) *This Rule to be preferred.*—The rule as expressed in the case just noticed would seem to be grounded in policy, rather than upon any legal principle. Said Crowder, J., "The case is the same as if the child had been in the *mother's* arms;" and *per* Williams, J., "So, if the child be in the arms of a person who does not choose to get out of the way of a train." Thus it appears that the rule is, that the negligence of any person having authoritative charge of a child which is capable of exercising little or no care for its own protection, constitutes a bar to an action by the child for an injury received while such guardian is so immediately present as to have the child physically under control. This rule would seem to be based upon the soundest policy. The sins of the parent must be, in a measure, visited upon the child. If the child enjoys all the advantages flowing from parental or other authority and protection, it certainly should, to some extent, suffer from the consequences of the most obvious and culpable neglect of the guardian to perform this duty. Plainly, the child ought not to be answerable for every species of negligence on the part of its legal guardians. This would violate a well-established rule, that negli-



gence which is not the proximate cause of the injury cannot be considered as in the chain of causation, and therefore available by way of defence. But negligence of such a character that the accident would not have happened, although the defendant was precedently or concurrently guilty of negligence, is always available by way of defence. *Butterfield v. Forrester* was never doubted, though cited as frequently as any case in the reports. Where, then, shall the line be drawn? What negligence of the parent or guardian shall be imputed to the child? The decision of the court in *Waite v. North-Eastern Railway Company* would seem to indicate the true position, and the limits of the rule.

This rule should not be confounded with the absurd and repudiated doctrine of *Thorogood v. Bryan*, and kindred cases, which imputes to the passenger in the vehicle of a common carrier the negligence of his own carrier, in cases of injuries caused by the concurrent negligence of such carrier and the defendant. There is no analogy between the cases. The rule in that case ought to fail, because the identification of the carrier and passenger is not complete, the passenger being in no such state of subjection to his carrier as is the child to its parent or protector, and capable, moreover, of exercising some degree of care for his safety, independently of the negligence of his carrier. The passenger, being *sui juris*, cannot be considered as identified with his carrier, unless upon the theory of agency, a relation which cannot be pretended to exist, as he has no control, management, or even advisory power, over the servants of the carrier.

Upon the principle of the English rule, the decision in *Holly v. Boston Gaslight Company* is plainly supportable, although the child, plaintiff in the case, was nine years old, a period of maturity at which, ordinarily, a child is exempted from the imputation of negligence on the part of its custodian. It will be seen that the *presence* of the parent had the effect of imputing to the child his negligence. The plaintiff was made sick by the escape of gas in her father's house. The facts were, that about the middle of the day the father detected the odour of gas in his residence, of which the agent of the defendant was subsequently notified, who, late in the day, discovered the leak to be in the street; consequently, it could not be reached, without considerable inconvenience, until the next day. During the night, the gas escaped in large quantities, but the parent took no other measures for the plaintiff's protection than twice visiting the plaintiff's sleeping-room and increasing the ventilation, although he himself was made sick by the escape of the gas. Early in the morning, he found the plaintiff on the floor of her room, nearly insensible, and that she had been vomiting from the effects of the gas. Medical treatment was necessary to restore the plaintiff's health. The jury were instructed that, being under the control of her father, she would bear the consequences of any want of ordinary care on his part in reference to the injury she had sustained, whether in tardily notifying the company of the

escape of the gas, or in failing to use ordinary care in withdrawing the plaintiff from its effects. This instruction was held to have accurately stated the law. Said Merrick, J.: "She was under the care of her father, who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."

The late case of *Stillson v. Hannibal, etc., Railroad Company* is a further illustration upon this point, and especially noticeable because the Supreme Court of Missouri had previously repudiated the rule of imputed negligence declared in *Hartfield v. Roper*, as "harsh, and repugnant to justice." The plaintiff in this case was also nearly nine years of age, and "remarkably sprightly." In company with her father, she came upon a railroad crossing which was blocked with freight trains. The father having been over the crossing a few minutes previously, when alone, was now returning with his little daughter. As they approached the crossing, the child said, "Papa, how did you get over?" Her father then described how he had; and, coming nearer to the blockade, pointed out an aperture a short distance east of the crossing, less than twenty inches in the clear, between the rear cars of two freight trains, attached to one of which was a lighted locomotive, preparing to take the train out. Thereupon the child playfully sprang forward five or six feet in advance of her father, to anticipate him in passing through the place indicated. Just as the child was making its way between the trains, the aperture was closed, on account of some slight impetus imparted to one of the trains, and the plaintiff was severely injured. The court held that it should have been submitted to the jury whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury, in which case such negligence was properly imputable to the child in this action.

The Supreme Court of Pennsylvania having repudiated the rule of imputed negligence, in early cases, has shown no disposition to adopt any form of it. Thus, in *North Pennsylvania Railroad Company v. Mahoney*, a child four years of age was not barred of its action simply because, at the time of its injury, it was in the arms of a person to whom it had not been intrusted, who once rescued it from peril, but immediately negligently exposed it again to danger, whereby it was injured through the negligence of the defendant's servants. And in *Pittsburgh, etc., Railway Company v. Caldwell*, the plaintiff, a child five years of age, was permitted by her elder sister to accompany another child, eleven years of

age, upon a walk. During their wanderings, the pair got upon a street-car, in leaving which the plaintiff was injured by the concurrent negligence of the defendant's driver and the child having the plaintiff in charge. The court held that the negligence of her companion could not be imputed to the plaintiff, because "she was not in her custody, or subject to her control. The plaintiff was in her company, but not in her keeping." Whether negligence of the parent or a proper custodian of the child, in a similar situation, would have been imputed to the child, was in neither of the foregoing cases decided.

In *Bellefontaine, etc., Railroad Company v. Snyder*, the negligence of the custodian to whom the care of a child *non sui juris* was intrusted by its parents, although actually present at the time of the injury, and holding the child by the hand, did not bar an action by the child for such injury.

(4.) *Hartfield v. Roper as Authority—The Rule in this Case modified in Application.*—This decision has received the support of subsequent cases in New York, and of the courts of last resort in Massachusetts, Maine, Maryland, Indiana, Illinois, California, and Nebraska. On the contrary, its authority is denied in Pennsylvania, Vermont, Connecticut, Ohio, Virginia, Missouri, and Alabama.

We find gratifying evidence of the crudeness of the rule in *Hartfield v. Roper*, in the refinements upon it in subsequent decisions. In the state where the decision was rendered, it was, indeed, followed in all its harshness in at least two subsequent decisions, but such is not the effect of more recent adjudications. Thus, it is especially noticeable that cases of this kind are readily submitted to that body which is more than zealous in upholding the rights and redressing the wrongs of the weak—the American jury. All that is needful to accomplish this is to show that the parents, or others in charge of the child, were watchful of the child to a certain degree—an extraordinary degree of care need not be shown; that the child *escaped* from their control, and was injured by the negligence of the defendant. The question then comes before the jury as to the sufficiency of the means employed—whether those in charge of the child took reasonable care in restraining it from circumstances of danger. It is safe to say that under such circumstances the jury will generally find that all the care was taken of the child which the exigencies of the case demanded. In some states, the degree of care which parents are bound to take to prevent the escape of their children from their immediate supervision is made to depend upon their condition in life and resources. It is unnecessary to add that, under this rule, in cases of extreme poverty, where both parents are obliged to work incessantly for a bare subsistence, a jury would require very slight, if any, supervision on their part.

Another qualification of the rule is found in a class of decisions the effect of which is, that if a child, though *non sui juris*, has been.

guilty of no conduct which would constitute negligence in a person of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child. In such a case, the child being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recover for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. Thus, in *M'Garry v. Loomis*, it was held that a child four years of age, being upon the side-walk (which did not constitute negligence *per se*), and found by the jury to be in the exercise of proper care, was held entitled to recover for an injury received by falling into a pool of hot water, adjacent to the side-walk, formed by the escape of steam and water from the waste-pipe of the works of the defendant. This is further illustrated by the cases of children run over in the highway, when their conduct is all that could be expected of adults reasonably prudent.

Additional evidence of the relaxation of the rule will be found in the fact that, under certain circumstances, children of tender age are permitted to be upon the street. Thus, in *Cosgrove v. Ogden*, it was held that the fact that a parent living upon a quiet street, where few vehicles passed, permitted a child six years old to go unattended upon the streets, did not constitute negligence *per se*, but was to be submitted to the jury. In *Drew v. Sixth Avenue Railroad Company*, the court refused to declare as a matter of law that the parents were guilty of negligence in sending a boy eight years of age to school without a protector. Similarly it is held that it may be submitted to a jury whether a child four years and seven months old might not be permitted to go to school alone; or a boy three and a half years old be trusted abroad, accompanied only by his brother of nine; or one a little over three years, in company with another between nine and ten; or one six years of age, in company with another of ten. Much, however, depends upon the character of the place where the child is permitted to be—whether a busy or an unfrequented street, or whether other circumstances of danger are ordinarily present.

The rule loses much of its force in Illinois, from the fact that in this state the doctrine of "comparative" negligence prevails. The child may recover damages for an injury negligently inflicted, although the parent was negligent in permitting it to be abroad, provided this negligence was "slight," and the defendant's "gross" in comparison. Substantially the same is the effect of the rule adopted by the Maryland court. The child will not be prevented from recovering in consequence of the negligence of its parents, if the jury shall find that the consequences of such negligence could have been avoided by the exercise of ordinary care and prudence on the part of the defendant.

*III. Effect of Contributory Negligence of Parents upon their Right of Action for Injury to or Death of Child.*—In jurisdictions where

the rule of imputed negligence does not prevail, it is nevertheless necessary that the parent should be free from negligence in its care and control in order to recover damages for injury to, or death of, the child from the wrongful act of the defendant. Thus, in *Bellefontaine, etc., Railroad Company v. Snyder*, a child recovered for an injury, the result of the concurrent negligence of the defendant's servants and the person having it in charge. In a subsequent action by the father for the loss of the child's services by reason of this injury, the negligence of the child's custodian was held to be the negligence of the parent, preventing a recovery. In such action by the parent, as well as in that by the child, the necessities of the parent's condition, and his poverty of means for safely restraining his child, are in some states held to be proper matters of consideration upon the question of contributory negligence.

*IV. Circumstances of Injury.*—(1.) *Degree of Care demandable of Child.*—Where the child is of such tender years as to be incapable of discerning circumstances of danger, or exercising any efficient care for its safety, personally it cannot be said to be guilty of contributory negligence. Therefore, where the circumstances of the case do not justify the imputation of negligence on the part of others, or in jurisdictions where the rule of imputed negligence is not applied, the only question in the case is, whether the defendant has been guilty of any negligence which may reasonably be said to have been the cause of the injury; or, as expressed by Channell, B., in an action by a child three and one-half years old, "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shown that the injury was occasioned entirely by his own negligence. If the child is old enough to have some perception of danger, and capable of exercising other faculties for its self-preservation, it is held bound to do so, but only as efficiently as can be reasonably expected of a child of its maturity and capacity. This rule, however, as to infantile responsibility has been held not to prevail in the case of infant defendants in certain actions of tort. This flows from the fact that it was early established that the consideration in actions of trespass is not whether the defendant has been negligent, but whether the plaintiff has suffered from an *act* of the defendant which was not an inevitable accident. Accordingly, very young children have been held civilly responsible for injuries inflicted upon playmates, with apparently no intention of injury. The rule, however, rests upon very technical and unsatisfactory grounds, and is not strictly applied.

(2.) *Degree of Care to be exercised towards Child—Illustrations.*—It should be remembered that the rule declared in *Hartfield v. Roper*, revolting as it is to the natural instincts of humanity, permits neither a voluntary injury, nor conduct towards a child *non sui juris* amounting to "gross" negligence, although those in charge



of it have been negligent in the performance of their duties. There is no rule more just than that the public are bound to exercise a higher degree of care towards persons of this class than people in general; hence conduct which, as towards the general public, might be fully up to the standard of "due care," plainly may exhibit a reprehensible degree of negligence, or an inclination to do a wilful injury, when considered with reference to the class of helpless beings under discussion. Therefore, in a case of this kind, the negligence of the parent in allowing abroad a child two and one-half years of age did not prevent it from recovering damages for injuries received by being run over by an engine and tender, when crossing the track of the defendant, an accident which might have been averted by defendant's servants by the exercise of care due to its condition.

A child playing upon or about a railroad track, if it has exercised all the care of which it is capable under the circumstances, may recover for an injury received in consequence of the negligent operation of trains upon this track. But, of course, no recovery can be had in such a case where no breach of duty on the part of the defendants is shown. In cases of injuries to children from the operation of railroad trains, a failure to comply with statutes which have for their primary object the protection of domestic animals has been held to be proper evidence of negligence on the part of the railroad company. But it was held not sufficient evidence of negligence to justify the submission of a case of this kind to the jury, where it appeared that a single rail only was off a fence inclosing the track, and that children were run over by the train under circumstances absolving the managers of the train from negligence, and it was not shown that the children got upon the track through this defect in the fence.

If the driver of a street-car permits or invites children to ride thereon, such an act will be regarded as within the scope of his employment; therefore, the fact that he suffers the children to ride upon the front platform will, in certain cases, be held to be evidence of negligence. But previous encouragement alleged to have been given by the defendants' servants to a child to get upon their steam-cars while in motion, even if it could be considered within the range of their employment, cannot be regarded as the proximate cause of an injury resulting from the attempt of the child to climb upon the cars while in motion, the defendants' servants being, at the time, in the exercise of ordinary care, and in ignorance of the child's attempt to get upon the cars. It is held to be no evidence of negligence that a street-car drawn by a single horse, the driver acting, at the same time, as conductor, ran over a child whom the driver noticed standing near the track when his car was about twenty or thirty feet distant, his attention being, at the time of the injury, diverted to a passenger inside the car.

(3.) *Children as Trespassers.*—The law upon this subject may



be said to date from the case of *Lynch v. Nurdin*, the circumstances of which, although familiar, will bear restatement, as the effect of this decision is sometimes misapprehended. The defendant's servant left his horse and cart standing alone upon a public street for about half an hour or less. The plaintiff, a boy between six and seven years of age, and several other children gathered about the cart during this time. The plaintiff got upon the cart, and, in getting off, fell under the wheel, and had his leg broken in consequence of being run over, a companion at that time leading the horse forward. It was contended that there was no evidence to support a verdict for the plaintiff. The case, however, was submitted to the jury, to say, first, whether it was negligence in the defendant's servant to leave the horse and cart in the manner and for the time before stated; and, secondly, whether that negligence occasioned the accident. The plaintiff had a verdict, which was sustained in the Queen's Bench. Lord Denman, delivering the opinion of the Court, held that the servant was clearly guilty of negligence in tempting the child to amuse himself with an empty cart and deserted horse; and that the child, though acting without prudence or thought, had shown these qualities in as great a degree as he could be expected to possess them.

The points to be noticed in this case are: 1. Negligence by the defendant's servant, resulting in a *temptation* of the plaintiff to engage in mischief; 2. A technical trespass by the plaintiff, a child capable of exercising only a slight degree of care for its safety, but not so completely incapacitated in this respect as to be denominated, as matter of law, *non sui juris*; 3. Conduct by the plaintiff which, in the case of an adult, would clearly have amounted to negligence *per se*.

Whether this case is still to be regarded as the law of England has been rendered uncertain by at least two subsequent adjudications, in which its authority, though not expressly repudiated, is greatly shaken. On one occasion, *Lynch v. Nurdin* was cited in the course of argument, when Martin, B., interjected, "That case was questioned in *Lygo v. Newbold*."

The cases of *Hughes v. Macfie* and *Abbott v. Macfie* are plainly inconsistent with the authority of *Lynch v. Nurdin*. The facts briefly were, that the plaintiffs, aged respectively seven and five years, were playing about a bulkhead which opened from the cellar of the defendant's warehouse into a public street, the cover or door of which was left raised and tilted up against the wall of the building. The boy Hughes, in some manner disturbing its equilibrium, caused it to fall upon himself and companion. The Court of Exchequer held that in no event could Hughes recover damages for the injury received; nor Abbott, if playing with Hughes, so as to be a joint actor with him. The fact of the children being of tender age was held to make no difference on the question of contributory negligence.

In *Mangan v. Atterton*, the defendant exposed in a public place, unfenced and without superintendence, a machine which might be set in motion by any passerby. The plaintiff, a boy four years old, by the direction of his brother of seven, placed his fingers within the machine, while another boy was turning the handle which moved it, whereby his fingers were crushed. The defendant was held not liable, on the ground that he was guilty of no negligence, and moreover because the wrongful act of the plaintiff had brought the act upon himself. Said Bramwell, B.: "The defendant is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tort-feasor?"

From the foregoing, it would seem to appear that in England it is yet an unsettled question whether a child of tender years, guilty of a technical trespass, but exercising all the care reasonably to be expected of his age and capacity, can recover damages of a defendant for an injury caused by his negligently exposing that which a child's natural instincts may bring him in contact with, to his hurt.

*The Rule in the United States.*—The rule in *Lynch v. Nurdin* is sustained by the weight of authority in this country. It received the assent of the highest tribunal, in the case of *Railroad Company v. Stout*, where a railroad company was held liable for an injury to a child, six years of age, who went to play upon a turntable left unguarded and unlocked, in a situation likely to cause injury to children. The same rule is adopted in Connecticut, Pennsylvania, Illinois, Tennessee, Missouri, Wisconsin, but it is doubtful whether in New York.

The Supreme Court of New Jersey held, in one case, that the fact that, from some unexplained cause, a pile of lumber fell upon a child, while trespassing upon the premises of the defendants, who had given their watchman orders to exclude children, which was generally done, created no liability.

The principle of the cases of *Hughes v. Macfie* and *Mangan v. Atterton* seems to have been adopted to its fullest extent in Massachusetts. The defendant, in violation of a city ordinance, left his truck standing overnight in front of his foundry (a place where he knew children were accustomed to play), with an iron casting upon it weighing nine hundred pounds. The casting was not triggered upon the truck, and was of such a shape as to roll off easily. The wheels of the truck were not triggered, and when it was put in the street, its tongue was so placed that a slight movement of it was sufficient to displace the casting. Just before night, two children, one of them seven years and three months old, and the other eight years of age, were passing along the street, when a

third boy, twelve years old, not in their company, called to them to come over and see him move the truck. They did so, and upon his moving the tongue slightly, the casting rolled off, injuring the younger boy, who stood beside the truck. The jury were instructed, that if the plaintiff took an active participation in the acts of the boy moving the tongue, or went there as a joint actor for the purpose of encouraging him, he could not recover; but if he went there, attracted by curiosity only, at the invitation of such person, he could recover, if he was in the exercise of due care. Such instruction was held to be correct.

The circumstances of this case, while strikingly similar to those of *Lynch v. Nurdin*, indicate less imprudence on the part of the plaintiff, and a far greater degree of culpability on the part of the defendant. The high authority of decisions of the Massachusetts court ought not to shield such an adjudication from criticism. It is not perceived on what ground this ruling can be supported. The defendant was clearly guilty of great negligence. The plaintiff was bound to exercise no more prudence than could be reasonably expected of a child of his years. The injury was the proximate result of the defendant's negligence. It is not surprising that under this instruction the jury found the plaintiff was not a "joint actor" and entitled to recover. It is to be desired, on the score of humanity as well as legal principle, that the binding force of decisions which hold the lives of children so cheap will never be recognised—in jurisdictions, at least, where the matter is as yet *res integra*. However, the rights of property-owners and the proprietors of industrial enterprises should be closely guarded. No just rule will, on the one hand, jeopardize life, or, on the other, the rights of property.

(4.) *Children and Minors as Employees*.—The general rules applicable to service are well understood: that the master is not liable to his servant for injuries to him produced by the negligence of a fellow-servant engaged generally in the same business, provided there be no negligence in the appointment of such negligent servant, or in the retention of such servant after notice of his incompetency; that where an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer. Does the fact that the employee is a child in any manner affect the operation of these rules? Generally speaking, the mere fact that the employee is a minor does not exempt him from the operation of the foregoing rules. If the minor is engaged in the service by permission of his parent or guardian, or under a valid contract made with the minor himself, he is subject to them. But the Court will not, as a matter of law, decide that a child old enough to be employed about machinery has sufficient capacity to apprehend all the hazards of his employment. Where there is room for doubt upon this point, it is proper

to submit the question to the jury. Thus, in *Hayden v. Smithville Manufacturing Company*, it was held that this qualification of the rule might be applied in the case of a child ten years of age. The master is therefore bound to see that the child is of sufficient age and intelligence to understand the nature of the risk to which he is exposed, and he is further bound to explain to him those risks in such a manner as to enable a person of his youth and inexperience in the business to intelligently appreciate the nature of the danger attending its performance. *A fortiori*, if the master or vice-principal, by positive act or orders, exposes him to an unreasonable risk, or puts him to the performance of a duty for which he is obviously unfitted by reason of his youth or inexperience, the master must respond in damages for injuries sustained in consequence of obedience to such commands. But this liability does not ensue where such exposure is the result of compulsion by a *fellow-servant*. Obviously, the principle of *respondeat superior* can have no application to such a case.

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### Review.

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*Elements of International Law.* By HENRY WHEATON, LL.D. Second English Edition. By A. C. BOYD, LL.B. London: Stevens & Sons. 1880.

WE so recently noticed the post edition of this book (*Journal of Jurisprudence*, vol. xxii. p. 262), and at such length, that we need not now enter into detailed comments on it. The best proof of its excellence and the want which it has supplied is to be found in the fact that a new edition has been called for in so short a time. The principal addition to the present edition is the Treaty of Berlin and other papers bearing on the Eastern Question. The information is thus brought down to date, and renders the volume one of the most useful works which can be put into the hands of our law students. It would be well if all our would-be statesmen and sucking members of Parliament were to master its pages. The ordinary M.P., however, is far too clever a fellow to bother himself about international law.

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### The Month.

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*Sunday "Deseccration."*—We publish this month in our Sheriff Court reports a case in which the question mainly was as to what may be considered "works of necessity and mercy" which may be legally performed on Sunday. The defender was a medical man

practising in a country district, and one Saturday night he came home about nine o'clock, driving a gig which had been lent him by a friend while his own was getting repaired. Having to go out on professional work early next morning, he ordered his groom, a lad of about seventeen years of age, to have water ready so as to be able to wash it in the morning when he could see to do so properly. Several motives no doubt influenced the doctor in so doing. In the first place he evidently wished to save the lad as much trouble as possible in the morning, and so ordered him to get the water ready overnight; he not unnaturally also wished that the gig should look smart and tidy in the morning, and so harmonize with that abnormal splendour of appearance which is so closely associated with the observance of the Sabbath. In all probability too he was likely to meet the friend who had good-naturedly lent him the gig, and if the "machine" had been seen crusted over with the cake of two days' mud the chances were that he might object to conferring the obligation on a future occasion. Whatever may have been the reasons which influenced the doctor's mind, however, in directing his gig to be cleaned on the Sunday morning, he was met with a decided refusal on the part of the lad: his master then told him that he must do what he was told, and then we may presume there were the usual "words" that generally take place between a master and a departing servant. The lad then went off, but returned with his father, and they both stuck to the determination that the gig should not be cleaned on Sundays. Well grounded in the Shorter Catechism, and strong in their resolution to keep inviolate the sanctity of the Scottish Sabbath, they advanced to the charge and declared that they could not do anything on that day which might relate to "worldly employments or recreations," except what might come under the category of "works of necessity and mercy." The boy then sued for wages, and the case came up the other day before Sheriff Comrie Thomson at Aberdeen. The learned Sheriff goes over the law on the subject of Sunday observance very clearly. It has been already treated of very fully in our pages (*Journal of Jurisprudence*, vol. xx. p. 67), so that we need not enter into any detailed consideration of it at present. The learned Sheriff seems to have exercised a wise discretion in deciding that in domestic work it must lie very much with the master to say what is and what is not necessary Sunday labour. A servant's duty in the circumstances is to follow the apostolic injunction, and to obey his master. Of course there is no rule without exceptions, so that in some cases it might be justifiable to refuse compliance; such, however, cannot practically occur very often.

Meanwhile the case affords a curious commentary on the opinions and practice of the people in the north of Scotland. "God-fearing" Scotland has become a sort of proverbial expression, and no higher testimony to the merits of a nation can be conceived,

if well founded. Unfortunately, however, we are afraid that the phrase originated in Scotland itself, and that we have long prided ourselves that "we are not as other men are." We hold up our professions of Sabbath observance and church going, and hide from ourselves many deficiencies which more than counterbalance what we esteem as the proudest features of our national life. This, however, is not the place to enter on topics such as these, so that we will conclude by advising the good folks in Aberdeenshire to try, before refusing to wash doctors' carriages on Sundays, to alter two sets of statistics which appear in official papers—one, the number of gallons of spirits drunk in Scotland every year; and the other, the position which Aberdeenshire holds in the Registrar-General's returns of births.

*Solicitors in Paris.*—The following interesting account of the profession in Paris is given by a correspondent of the *Law Times*. Alluding to the various irregularities of solicitors, and the unfortunately frequent way in which they have figured of late as defaulters or criminals, he says: "In my opinion a somewhat similar system of organization might advantageously be adopted in England to that existing in Paris, where professional scandals of the above nature are almost unknown. The population of Paris is about half that of London, but the number of *avoués* or solicitors practising in the courts of first instance is limited to 150. There are 112 *avoués* practising in the Courts of Appeal and Cassation, and 123 notaries. In addition to the above there are 15 *agréés*, viz. officials who combine the functions of counsel and solicitor, having the sole monopoly of the mercantile business in the Tribunal of Commerce of the Seine, comprising Paris and the whole of the department of the Seine. These numbers cannot be increased, and new aspirants who have passed the needful examinations must wait till a vacancy occurs, either by the death or by the voluntary transfer of an *étude* or goodwill of a business. The *clientèle* of a French *avoué's* office as a rule continues with the successor or purchaser. *Licenciés en droit* who have not the means nor the opportunity of purchasing an *avoué's* practice in Paris must content themselves with an *étude* in the provinces. The inconveniences of the monopoly are various; for instance, the business is necessarily distributed amongst the limited few, and the lack of competition begets indifference and a want of diligence very trying to English clients. Apart from this there are comparatively few able men in the profession. Students can only enter it by purchase, and whatever may be their ability, they cannot acquire a practice without possessing ample means, viz. upon an average, £8000 to purchase an *étude* in Paris at the outset, and the further capital to enable them to carry it on afterwards. On the other hand, however, there is no dishonour in the profession. None of the *avoués* in Paris are, so far as current report goes,



insolvent; nor do any of them live from hand to mouth, as is the case unfortunately with many solicitors in London. I have made inquiries, and have found that not a single *avoué* in Paris has been suspended or struck off the rolls, or been sentenced by a criminal court for many years past. The social standing of the Legal Profession in France is therefore deservedly high, and the sense of security, when dealing with its members, absolute. The body of *avoués* is further governed and supervised by a severe council of discipline, composed of members elected by themselves, by which the slightest infringement of professional etiquette is promptly reprimanded; but the instances calling for the intervention of the *Chambre* are, I believe, very rare. I have the various laws and regulations relating to French solicitors now before me *in extenso*, and shall be pleased to forward a translation thereof, as well as any further information, to any member of the legal profession in England who takes an interest in the subject, upon application. In this letter I have confined my remarks to Paris alone, but the professional standard throughout France is almost equally high."

*Legal Chronology.*—We are indebted to our excellent neighbours the *London Law Times* and the *Solicitors' Journal* for copies of the Almanacs presented by them to their subscribers. These are very useful publications for the profession, for they serve to remind them of their most important engagements. For instance, according to the *Solicitors' Journal* Almanac, January 1st, dog licences are to be taken out; 5th, dividends due at bank. February 1st, which by the way is Sunday, partridge and pheasant shooting ends; 25th, hare hunting ends. March 1st, fly fishing begins. April 4th, Sunday, game certificates expire. August 12th, grouse shooting begins, and on the 20th, black game shooting. September 1st, partridge shooting begins, and on the 14th, buck hunting; and on the 30th, dividends due on India bonds. October 1st, pheasant shooting begins, and on the 29th, hare hunting. November 1st, salmon fishing ends. December 10, grouse and black game shooting ends; and on the 28th comes the lawyers' calendar day, namely, "Innocents." According to the *Times' Almanac*, also, February 2nd, salmon fishing begins. We take it that the *Times'* man is more religious than the *Journal's*, for the former makes partridge and pheasant shooting end Saturday, January 31st, instead of Sunday, February 1st. The former has a larger *repertoire* than the latter, for he advises us that bustard shooting ends March 1st, and fox hunting begins (?) March 3rd. Also, he is more given to the pleasures of the table, for he reminds us that the oyster season begins August 4th. We don't eat oysters in that month, for it has no "r" in it. He is probably stouter than the latter, for he notes the beginning and ending of dog days. He probably has an aversion to dogs also, for he notes that dog licences expire December 31st, but takes no note of the

time for taking them out. Of course, as legal authorities differ on grave subjects, we find the *Times*' man announcing black game shooting as commencing August 21st, and ending December 9th, instead of the 20th and 10th, as the other chronographer has it. Each notes a few of the famous historical events, such as the marriage of the Prince of Wales, the battle of Waterloo, the Gunpowder Plot, the ending of the Tichborne trial, the silver wedding of the Emperor of Austria, the death of the first Napoleon, and the closing of the Fleet Prison. We conclude that the bar of England mingle pleasure with business to a greater extent than our own.—*Albany Law Journal*.

*The New Law Peer.*—We have to congratulate the Lord Advocate, and through him the Scottish Bar in general, on his elevation to the House of Lords. It is needless for us to dwell on the advantage which it is evident there must be in having a Scottish lawyer in the Supreme Court of Appeal. We have no doubt that the new Lord will make his influence felt there in a way it has not before been. In the appointments which were previously made Scotland was no doubt unfortunate. Lord Colonsay, excellent President though he was, was of too advanced an age when he was removed to the House of Lords easily to change the groove in which he had run so long; Lord Gordon's health had begun to give way even before his elevation, and though his opinion was always attentively listened to and highly valued, yet he lacked opportunity to make his mark as a judge of appeal. In the case of Lord Advocate Watson, however, we have a man in the prime of life, and one who has proved himself a distinguished lawyer and able advocate. It does not of course follow that because a man has been a success at the bar that therefore he should be a good judge—bitter experience has convinced many *habitués* of the Parliament House, both lawyers and clients, of that fact—but we may safely say that no man ever assumed the judicial ermine with greater prospects of success than does the Lord Advocate. With his promotion the office of Lord Advocate becomes vacant, and whichever political side may be in the ascendant when it comes to be filled up, there is no doubt that it can and will be filled up by distinguished men, who will be able to guide with ability the multifarious duties which pertain to the office, and who will keep up the dignity and influence it has so long enjoyed.

ROBERT K. GALLOWAY, M.A., has been admitted a member of the Faculty of Advocates.

# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF RENFREW.

Sheriff-Substitute SMITH, Sheriff FRASER.

M'KENZIE v. BOWIE.

*Debts Recovery Act, 1868—Sale—Fixed price—Guarantee against loss.*—John M'Kenzie, a farmer, sued Bowie, a potato-dealer, for £18, 16s. 10d., being the balance, which he alleged to be due him by Bowie, of the price of 4 acres 1 rood and 16½ poles of potatoes, which pursuer averred had been sold by him to defender at £25 per acre. The defence, as stated, was a denial of the price as charged. The defender affirmed that, though £25 per acre was nominally the price to be paid for the potatoes, the bargain, which was a verbal one, was made subject to the condition that if the potatoes turned out, on being dug and sold, to be a loss at said price, that loss was to be borne by the pursuer. The defender also averred that he had sustained loss, and had overpaid pursuer to the extent of £16, 19s. 2d., which he pleaded as a counter-claim.

Proof having been led, the Sheriff-Substitute (Smith) issued the following judgment :—

“*Greenock, 11th February 1880.*—The Sheriff-Substitute having heard parties' procurators, and considered the proof, Finds in fact : (1) That in the month of August 1879 the pursuer and the defender had some negotiations regarding the sale by the pursuer to the defender of the 4 acres 1 rood and 16½ poles of potatoes mentioned in the summons ; (2) that the pursuer has failed to prove that any definite price was fixed for the potatoes ; (3) that after the negotiations, and as the result of them, the defender took the potatoes, and that he made sundry payments to the pursuer for them, amounting in all to £90, 7s. ; (4) that the defender maintains that by the terms of the contract he is entitled to recover from the pursuer the difference between that sum and the sum which he says he realized by the subsequent sale of the potatoes ; (5) that the difference is said to be £16, 19s. 2d., for which sum the defender makes a counter-claim on the pursuer, but that the defender has failed to establish the alleged obligation by the pursuer to make good his loss ; (6) that the value of the potatoes did not exceed the said sums, amounting to £90, 7s., already paid for them to the pursuer by the defender : Finds in law that the pursuer is not entitled to decree for any further sum, and that the pursuer is not liable to the defender for the sum stated as due by him in the counter-claim, or for any part thereof : Assolzie the defender : Finds no expenses due to or by either party, and decerns.

HARRY SMITH.

“*Note.*—The Sheriff-Substitute thinks it is clear on the evidence that though £25 per acre was named as a price, it was not intended by either party that the true price should be fixed or adjusted till after it should be ascertained what sum the potatoes fetched in the market when resold by the defender. It does not appear to be uncommon in the trade to make arrangements of that flexible character. But the contention of the defender appears to be that the pursuer guaranteed him against all possible loss. That too seems to be a thing of not infrequent occurrence in potato-dealing. But it is a kind of contract which would require very clear and distinct evidence before it could be enforced in a court of law. Perhaps it even requires writing for its constitution. At any rate the Sheriff-Substitute thinks that the evidence adduced is insufficient to establish it in the present instance. He therefore repels the counter-claim.

“If the pursuer has failed to prove that the price was £25 per acre, and the defender has failed to prove the guarantee against loss, it would seem that the defender must pay the fair value of the potatoes at the time of his getting them. And although it cannot be said that the fair value has been

satisfactorily established by the evidence, there seems to be enough to show that in receiving, as the pursuer did, £90, 7s., he has already received not less than that fair value. But it is not clearly proved, and it cannot be assumed, that he has been overpaid, for it is improbable that the defender would give him more than was due; and when the defender paid £90, 7s., it is to be presumed that he did so in satisfaction of his debt.

"The success having been nearly equally divided, no costs have been allowed.  
"H. S."

Pursuer and defender appealed to the Sheriff (the Dean of Faculty), who pronounced as follows:—

"*Edinburgh, 23rd February 1880.*—The Sheriff having considered this process, Recalls the interlocutor of the Sheriff-Substitute of 11th February 1880: Finds that in the month of August 1879 the pursuer sold to the defender 4 acres 1 rood and 16½ poles of potatoes at the price of £100, being at the rate of £25 per acre under deduction of £2 per acre for loss sustained by the defender on a resale of them to a third party: Finds that there was paid to account of said sum the sum of £90, 7s. 2d.: Finds that the defender paid the fee of the measurer, amounting to 11s., and is entitled to repayment thereof from the pursuer: Finds that, deducting the said sums of £90, 7s. 2d. and 11s. from the said sum of £100, there remains a balance due by the defender to the pursuer of £9, 1s. 10d., and decerns therefor against the defender: Finds the pursuer entitled to three-fourths of the expenses and decerns. "PATRICK FRASER.

"*Note.*—The practice spoken to by a number of credible witnesses, who seem to give their evidence with all seriousness, is certainly a very singular one. It would appear that in an onerous contract of sale one of the parties shall get all the profit, and if there be any loss upon the transaction the other party who gets none of the profit shall sustain the whole of the loss. It reminds one of what has sometimes taken place under a contract of partnership, where one of the partners is to get the profit and the other to bear the loss, and which by the Roman law went by the name of *Societas Leonina*, from the well-known apologue of the lion and the wolf hunting together, when the lion took the whole spoils to himself. Ulpian deals with it in the Pandects. He there declares such a partnership to be null, it being most iniquitous that one person should bear the whole damage and receive none of the profit: '*Iniquissimum enim genus societatis est, ex qua quis damnum non etiam lucrum spectet*' (Dig. 17, 2, 29).

"The Sheriff does not go the length of saying (on the analogy of this rule) that a contract of sale whereby it is agreed that if the buyer shall upon a resale to a third party make any profit, he shall be entitled to keep it, while if there be any loss the seller must bear it, would be null. But at all events such a transaction must be proved upon clearer evidence than has been adduced in this case. The whole affair seems to have been gone about in the loosest way possible; and the terms of the contract are endeavoured to be eked out by casual expressions uttered by the parties after the contract had been entered into, and even after the potatoes had been dug up. The pursuer states the matter thus, 'My price was £25. He said that he would give £24, and would leave it to my pleasure whether I should exact another £1 per acre; that he would give me a *reference* of £1 per acre over the £24. I agreed to that offer.' And again on his re-examination he says, 'I told Ewing that if I was satisfied the defender was actually a loser, I would be willing to allow him a deduction of £2, though I was bound to allow him only £1.' The defender admits that the pursuer demanded from him £25, and says that the pursuer told him that he (the pursuer) would not see the defender a loser. Both parties are thus agreed as to the sum demanded, and as to something being deducted in the event of loss upon a resale. Upon re-examination of the defender he comes nearer to the point, for he there explicitly admits as follows: 'I made the pursuer offers of £20, £22, and £24 per acre.' But the pursuer would not take the £24, 'his reply always was, "Say you £25 and I will not let you lose."

"Taking the whole evidence together, the Sheriff is of opinion that the defender did offer £24 absolutely to the pursuer for the potatoes; that the pursuer always insisted upon the £25 with this concession, that if there was a loss there would be a deduction given to the extent of £1 an acre, and that afterwards he intimated to Ewing (who was the defender's foreman) that he would allow £2 per acre, and this latter concession the Sheriff holds him to; and upon these terms or something like them the bargain was settled, viz. that the defender was to pay £25 per acre, but that if he sustained loss to the extent of £2 an acre upon a resale by him (which he did), the pursuer would allow a deduction to that amount.

"Now upon this footing the amount payable by the defender

would be 4 acres 1 rood 16½ poles, at £25 per acre	£108	16	6
Deduct £2 per acre—say	8	16	6
	<hr/>		
	£100	0	0
Paid to account at sundry times	£90	7	2
Measurer	0	11	0
	<hr/>		
		90	18 2
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Leaving a balance due to pursuer of	£9	1	10

"The pursuer is not entitled to interest upon the open account (*Cardin & Darling v. Stewart*, 9th July 1869, 7 Macph. 1026). P. F."

Act.—J. Glen.—Alt.—R. Blair.

## ABERDEEN AND KINCARDINE SMALL DEBT COURT.

Sheriff COMBIE THOMSON.

LESLIE v. MACKIE.

*Master and Servant—Sunday Labour.*—The pursuer sued for £10 of wages and board wages, alleging wrongous dismissal. The Sheriff's observations in giving judgment sufficiently explain the facts. He said—

"The action is for recovery of wages, the pursuer alleging that he was wrongously dismissed. The defender is a doctor practising in a country district, and he engaged the pursuer, who is a lad between sixteen and seventeen years of age, as his groom, and to give assistance about the house and on a small farm which the defender occupies. On a recent Saturday night, about nine o'clock, the defender returned home in a gig which had been lent to him by a friend while his own was being repaired. He ordered the pursuer to have a supply of water at hand for the purpose of washing the gig next morning, the defender having received a message requiring him to use his gig on a professional errand at an early hour the following day. The pursuer stated distinctly that he would not wash the gig on Sunday, and he did not do so. On the Monday he repeated the expression of his determination not to clean the gig on Sundays; and on the defender explaining to him that he considered such refusal an act of insubordination, and incompatible with the relation of master and servant, the pursuer left his service. On the following day he returned with his father, and they both reiterated their determination that the lad should not clean the gig on Sundays. The refusal was put quite distinctly, on the ground that no work could lawfully be done, or ordered to be done, on a Sunday unless it was work of necessity or mercy, and that the cleaning of a gig came under neither category. The only other fact in the case which requires to be noticed is that the pursuer says, and I see no reason for disbelieving him, that he offered to clean the gig upon Saturday night, but that the defender forbade this, on the ground that the operation could not be properly performed by lamplight, and, apparently, on the broad account that he,



and not the boy, was to be the judge of the time when his gig was to be cleaned. These being the facts, the question to be determined is whether the defender's order to his servant to clean his gig on a Sunday was justifiable or not; and that is a question which, when one considers on the one hand the existing law on the subject, and on the other hand the prevalent usages and opinions of society, is not altogether easy to settle. There are a number of Acts of Parliament which regulate the observance of Sunday. An eminent authority says, 'Upon the subject of the strict observance of the Sabbath there are perhaps more enactments in the Scottish Acts than upon any other subject whatever. The Legislature appears to have felt more anxiety for the strict enforcement both of the religious and decent observance of the Sunday than they appear to have felt upon any other subject.' There is little doubt that some of these old Acts, passed many of them during troublous times in Scotland, and when piety unquestionably now and again degenerated into fanaticism, must now be held to have fallen by desuetude, but there are two statutes which as late as the year 1837 received the express and solemn authority of the House of Lords (reversing a judgment of the Court of Session) as being still in *vividi observantia*. By the first of them (1579) it is ordained 'that there be no markets nor fairs holden upon the Sunday, nor yet within kirks or kirkyards that day or any other days under the pain of escheating of the goods to the use of the poor within the parish, and sick-like that no handy labouring or working be used on the Sunday.' The next statute is in 1690, by which it is provided that men shall 'not only observe a holy rest all the day from their own works, words, and thoughts about their worldly employments and recreations, but also shall take up the whole time in the public and private exercise of the Lord's worship and in the duties of necessity and mercy.' It would serve no good purpose to enter upon a criticism of these enactments, or to speculate how far it is possible for them to be literally carried out at the present hour, because, as I have noticed, the fact remains that they contain the existing law on the subject, and, further, taking them at the lowest, they correctly express the spirit at least of the common law of Scotland. That this is so is put beyond doubt by authority. In *Learmonth v. Blackie*, 13th February 1828, the Lord Justice-Clerk Boyle, in deciding a question between a master and his apprentice, said, 'The boy's being out on the Sunday was no breach of the indenture, as the master cannot make him work on that day.' This doctrine was quoted with approval by the Lord Chancellor in *Phillip v. Innes*, 20th February 1837, which is the leading case on the point. In that case, which is the well-known Dundee barber's case, it was held that a barber's apprentice under an indenture which bound him 'not to absent himself from his master's business, holiday or week-day, late hours or early, without leave first asked and obtained,' could not be lawfully required to attend his master's shop on Sunday mornings for the purpose of shaving customers. The doctrine of that case may be shortly stated thus, that a general contract to serve cannot be considered as binding a party to serve on a Sunday, and is illegal unless the work comes within the description of necessity and mercy. I suppose that this doctrine is tacitly acknowledged in all cases of Sunday work, such as those on railways, in blast furnaces, newspaper offices, the Post Office, etc., 'necessity' being construed as a relative term, and more or less synonymous with that which is required for the comfort and convenience of the majority of the population. But none the less is it the law of Scotland that handiwork which is not done of necessity nor for mercy's sake is when done on Sunday a breach of the law. A distinction has, however, been drawn, and it does not seem to me to be altogether a fanciful one, between the case of a workman ordered to work at his craft or to serve in a shop for the sake of making gain to his master, and the case of a domestic servant ordered to perform an ordinary menial office *intra parietes* of a private house with which the public has no concern, and which is only for the master's convenience, and is incidental to the necessary domestic work and household arrangements. It is further essential to bear in mind that in determining what is a work of necessity in a domestic establishment a great deal must be left to the discretion of the master.



Life would be intolerable in a house in which the servants were to refuse to do a certain piece of ordinary work on a Sunday which their employer thought necessary, on the ground that they were of a different opinion. The Sunday work which a master may insist upon having done must be reasonably incidental to work which is necessary. For example, I should hesitate to hold that a master was entitled to insist that Sunday should be the weekly washing day or the day on which the silver plate not in daily use was to have its periodical scrubbing. On the other hand, a servant would be bound to see that such things as are in use at every meal are properly cleaned, even although that involve the operation of cleaning being done between the first Sunday meal and the second. In the present case, it may be assumed to have been a work both of necessity and mercy which led the defender to take out his gig on the Sunday morning. Plainly, the pursuer was bound to give him necessary assistance in doing so, and I am of opinion that it would be straining the law much too far to hold that the master was not justified in having his gig made clean and decent for his journey.

"The main difficulty I have in the case arises from the fact that the pursuer seems to have been willing to clean the gig on the Saturday night, so as to obviate the necessity for Sunday work, but, with reference to this, the principle which I have above alluded to comes in. The master must be the ultimate judge in such a matter. It is inherent in the relation of master and servant that the will and opinions of the one must yield to those of the other, except when the order is plainly illegal. Nor can it be left out of sight that evidence has been led before me to show that the defender's order on the occasion in question was in conformity with the ordinary customs of his professional brethren in the country.

"Such being the view I take of the case, I hold that the pursuer was in the wrong, although one cannot help feeling some respect for his conscientiousness, and hoping that he may be equally punctilious in what I may be permitted to call the weightier matters of the law. I shall allow him £2 as remuneration for the time that he served, and I will make no order as to expenses."

*Act.*—Meffet.—*Alt.*—Smith.

## SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

PROCURATOR-FISCAL v. WILLIAM THOMSON.—*March 17, 1880.*

*Education (Scotland) Act, 1872, sec. 70.*—A parent sent his child to school but failed to pay the fees for attendance, and did not apply to the parochial board for assistance to enable him to do so:—*Held*, that the school board could not obtain a conviction against him under the 70th section of the Education Act for failing to provide education for the child.

In this case the Sheriff-Substitute delivered the following judgment:—

"This is a complaint at the instance of the Procurator-Fiscal acting on behalf of the school board of the royal burgh of Banff, and founded upon the 70th section of the Education Act of 1872. It is alleged that the accused, William Thomson, has been and is now grossly, and without reasonable excuse, failing to provide elementary education for his daughter. It is admitted on the one hand that the child has been attending school with sufficient regularity, and on the other that the accused has not paid the fees for her attendance, nor up to the time of bringing this complaint made application to the proper quarter for assistance on the ground of his poverty. In these circumstances a novel question of considerable importance is raised, viz. whether a parent who fails to pay for the education which his child is receiving can be convicted of a failure to provide education?

"I have come to be of opinion that he cannot, and indeed without much

difficulty. School boards are under the Act entitled to exact fees for the education which they provide, and it is a duty which they owe to the rate-payers to see that these fees are exacted. They have the legal remedy which all creditors have of suing defaulting debtors in the civil courts. And it is, I confess, somewhat surprising to hear that they can put these debtors in the dock, exclude them from giving evidence, and crave a sentence of imprisonment against them. It will not be disputed, I assume, that a prosecution under this section is a criminal prosecution; that is manifest even without the appearance of the Procurator-Fiscal as prosecutor. Now what is the present accused but a debtor to the school board, against whom they might take, and in point of fact I understand have taken, proceedings in the Small Debt Court? He has purchased the commodity which they sell, viz. education, upon credit, and when the time of reckoning has come he cannot settle his account. It is said that the accused has failed to provide education because he has failed to pay for it, and it is thus being provided at the expense of others; and I admit that were this a mere abstract question of what is meant by the word 'provide,' the argument would be of great force; but the 69th section of the Act seems to indicate that education may be provided by a parent without being paid for by him, while it is only the duty of providing which is dealt with in the 70th section. That in this section the only case contemplated is that of children who are not in point of fact receiving education would appear from its very terms. It enacts that 'the clerk or other officer of the school board shall revise, add to, and correct a list of all such parents,' i.e. parents failing to perform the duty of providing education, 'and their children who have not received, and are not in course of receiving, such elementary education.' Now this list is the foundation of the subsequent prosecutions, and yet I hardly think the accused's name could properly be upon it, seeing that his child has received, and is in the course of receiving, her education. If a parent sends his child to school and sees that the attendance is regular, it appears to me that he provides education in the sense of the 70th section, the object of which manifestly was to render education compulsory. If he fails to pay school-rates, decree will go against him, his goods may be poinded, he himself imprisoned, but he is not subject in addition to a criminal prosecution.

"The case, I may observe, would have been entirely different had the school board insisted at the first upon the accused either paying the fees in advance, finding security, or making an application to the parochial board for assistance, and in consequence of his failure to do so had they refused to admit his child into the school. There would then have been a failure to provide education for which it might reasonably be said the accused was to blame. Nor do I find anything in the Act to prevent school boards thus protecting themselves against the non-payment of fees. But the only remedy which they have against a debtor is one which must be sought in a different way and in a different court."

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## Notes of English, American, and Colonial Cases.

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**TRADE-MARK.—Injunction — Registration — "Family Salve" — Trade-Marks Registration Act.**—The plaintiffs had for fifteen years and upwards manufactured and sold a medicine under the name of "Reinhardt's Celebrated Family Salve," and in the year 1876 they registered the words "Family Salve" as their trade-mark in connection with such medicine, under the Trade-Marks Registration Acts. The defendant in 1868 registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," and he had since manufactured and sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full,

but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by the plaintiffs for an injunction—*Held*, that the words "Family Salve" were both a "distinctive heading," and also "special and distinctive words used before the passing of the Act," within section 10 of the Trade-Marks Registration Act, 1875; that the plaintiffs having by the registration acquired a *prima facie* right to the exclusive use of the two words "family salve," the *onus* lay on the defendant to displace that right; and that the defendant having failed to discharge that *onus*, an injunction must be granted.—*Raggett v. Findlater* (43 L. J. Rep. Chanc. 64) distinguished. *Reinhardt v. Spalding*, 49 L. J. Rep. Chanc. 57.

**EVIDENCE.—Public document—Entry in discharge of duty—Committee of Privileges—Herald's visitation.**—A report made by a public department to the Government in discharge of their duty, and in answer to a reference to them, is not admissible as evidence of the facts stated in such report. An action was brought by S., whose claim depended upon the question whether A. M. (No. 1) was identical with A. M. (No. 2), who was born in 1744, at Quarto, near Genoa. S. tendered in evidence a document which came from the public archives at Genoa, being a report of a public department called the Giunta della Marina to the Genoese Senate, in answer to a reference directed by the Senate to inquire as to the fitness of A. M. (No. 1) for the post of diplomatic agent in London. There was evidence that this department was a permanent office, whose duty it was to entertain such references and to report thereon. Their report stated his fitness, and also that A. M. (No. 1) was a native of Quarto, about forty-five years of age (which would identify him with A. M. (No. 2) born in 1744), and that these facts had been ascertained from persons well acquainted with him. The Senate on that report appointed him to the post:—*Held* (affirming the decision of Malins, V.C.), that such document could not be admitted as evidence of the place of birth and age, either on the ground of its being a public document coming from the proper custody, or as an entry of a contemporaneous fact by a person whose duty it was to make an entry of that particular fact at the time. To make an entry by a deceased person evidence of a fact, it must be, first, an entry of a transaction effected by the person who makes the entry; second, an entry made at the time of the transaction, or near to it; third, an entry made in the usual course and routine of business by that person; fourth, that the person making the entry had at that time no interest to misstate what had occurred, per Brett, L.J.—*Polini v. Gray*; *Sturla v. Freccia*, 49 L. J. Rep. Chanc. App. 41.

The practice with regard to admission of evidence before the Committee of Privileges, and as to admissibility of heralds' visitations discussed.—*Ibid.*

**RAILWAY.—Passenger—Contract to carry.—Ticket with conditions limiting liability—Knowledge of passenger.**—The plaintiff took a return ticket issued to him by the defendants (an English railway company) for the journey from London to Paris and back. The ticket was in the form of a small book with a paper cover, on the outside of which were the words, "Cheap return ticket. London to Paris and back. Second class. Available by night service only." Inside, sewn up with the cover, were the coupons for the different stages of the journey, and a page containing, amongst notices relating to luggage, a notice that this company "incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being booked to travel over the railways of other companies, such through booking being for the convenience of the passenger." The plaintiff sustained an injury whilst being carried in France under this ticket on the railway of a French company. In an action against the defendants for such injury, the defendants relied on the said notice on the ticket relieving them from responsibility in the event which had occurred. The jury found that the plaintiff did not see or know of this notice, and further that the defendants had not done what was reasonably sufficient to bring it to the knowledge of the plaintiff:—*Held*, that notwithstanding such findings, the defendants were

entitled to have judgment entered for them, as the whole of this ticket-book and not merely what was on the outside formed the contract under which the defendants agreed to carry the plaintiff, and that therefore, in the event which had occurred, the defendants were, according to the terms of the contract, relieved from responsibility.—The case of *Henderson v. Stevenson* (L. Rep. 2 Sc. App. 470) distinguished. *Burke v. The South-Eastern Railway Co.*, 49 L. J. Rep. Q.B. 107.

**VENDOR AND PURCHASER.—Conditions of sale—Misedescription—Compensation after conveyance—Completion.**—In an agreement for the sale of land, it was provided by the conditions that, if any error or misstatement should be found in the parcels, it should not annul the sale, but that compensation should be made in respect thereof. After completion, and after the conveyance had been executed, an error in the quantity of land conveyed was discovered by the purchaser:—*Held*, that the purchaser was entitled to compensation.—*Manson v. Thacker*, 47 L. J. Rep. Chanc. 312; L. Rep. 7 Ch. D. 620, not followed. *In re Turner and Skelton*, Ch. 49 L. J. Rep. 114.

**VENDOR AND PURCHASER.—Partnership—Misrepresentation—Lien.**—An incoming partner set aside the agreement for partnership on the ground of misrepresentation:—*Held*, he was entitled, subject to the satisfaction of partnership debts, to a lien on the partnership assets, both for purchase-money and partnership disbursements.—*Mycock v. Beatson*, Ch. 49 L. J. Rep. 127.

**VENDOR AND PURCHASER.—Sale of public-house—Mutual mistake—Specific performance.**—Plaintiff being the lessor of a public-house subject to a covenant against Sunday trading, put the same up for sale, having previously obtained from the freeholder a letter which was stamped as an agreement offering to release the restrictive covenant. Defendant at the sale became the purchaser, both parties being under the impression that the freeholder could alone release the covenant. The abstract delivered to the purchaser showed that the plaintiff held under an underlease by demise, a reversion of one day being vested in A and B, whose consent to a release of the covenant was necessary, which fact was overlooked by the purchaser, he taking an underlease at an increased rent, in which the covenant was omitted, and he paid his purchase-money partly by a cheque and entered into possession. The day after the mistake as to the parties to release the covenant was discovered, and the defendant stopped payment of the cheque. The plaintiff had offered to rescind the contract:—*Held*, that the defendant, not having discovered the mistake till after completion through his own negligence, was too late in taking his objection, and specific performance was decreed.—*Allen v. Richardson*, Ch. 49 L. J. Rep. 137.

**JAMAICA.—Governor—Acts of—Courts of the colony—Jurisdiction of.**—The governor of a colony does not possess sovereign power. His authority is derived from his commission, and is limited to the powers thereby expressly or impliedly intrusted to him, and he may be sued in the Courts of the colony of which he is governor.—*Sir Anthony Musgrave v. Pulido*, Privy Council Cases, 49 L. J. Rep. 20.

**NUISANCE.—Statutory authority to establish asylums—Power of statutory superior to sanction an act resulting in a nuisance—Authority given by statute, how to be pursued—Liability for nuisance of local authority acting under direction of local Government Board—Smallpox Asylum and Metropolitan Poor Act.**—An hospital for smallpox was erected by the defendants, a body created under the Metropolitan Poor Act, 1867, and the plan pursued by them was sanctioned by the Local Government Board. In an action by neighbouring occupiers for damages for a nuisance, the jury found that the hospital was a nuisance, and that the defendants had not exercised all proper and reasonable care in carrying it on:—*Held*, that the defendants would not be protected by the sanction of the local Government Board if what was sanctioned was not legal; and that the statute under which the defendants acted did not authorize the creation of a nuisance or interference with private rights.—*Hill v. The Managers of the Metropolitan Asylums District*, Q. B. (App.) 49 L. J. Rep.

# THE JOURNAL OF JURISPRUDENCE.

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## THE AMENDMENT OF THE BALLOT ACT.

Now that the elections are over, it may be interesting to notice some incidents that have occurred in the working of the machinery for taking the votes of electors, and some questions which have arisen as to the construction of the Acts regulating elections; and it may be of advantage to consider what alterations are required on the existing law. The manner of marking the ballot paper, what marks make the vote good and what marks make the vote bad, is the subject to which most attention has been drawn and which is of most interest and importance to the general public. Voting by ballot is as simple a process as anything can be. The voter makes a cross on the right-hand side of the name of the candidate whom he favours, folds his paper, shows the official mark on the back to the presiding officer, puts the paper in the box; and the whole thing is done. Yet the variations from this simple procedure which voters, at great personal trouble, devise for themselves, with the effect of invalidating the vote, are amazing in their ingenuity. So also it must be confessed are the deviations devised by officials, both presiding officers and returning officers. At the present general election, at the previous general election, and at many by-elections, many votes have been spoiled by the presiding officer or the clerk under his direction marking the elector's number on the register, not on the counterfoil, as the Act clearly directs, but on the front or the back of the ballot paper itself. Twice over the Ballot Act (sec. 2, rule 24) says that, at the time of voting, the ballot paper shall be marked on both sides. In one burgh of the Ayr district of burghs not one of the ballot papers was marked on the face; and the same thing occurred in the case of about one hundred votes at the Renfrewshire election. The Sheriff of Renfrewshire rejected such votes; the Sheriff of Ayrshire sustained them. We think the Sheriff of Ayrshire was right, because the Act imposes the sanction of nullity only in the case of the official mark being wanting on the *back* of the ballot paper (sec. 2). *Expressio unius, exclusio*



*alterius*. At Inverary the presiding officer gave a voter a tendered ballot paper instead of an ordinary one, and the tendered paper was marked and put in the ballot box, which should never be done with a tendered ballot paper in any case. The blunder having been discovered, the proper course was to give the elector an ordinary ballot paper, as should have been done at first. When the votes were counted the tendered ballot would have been held as nothing. Tendered ballot papers are not counted at the time of counting the votes, but only in the event of a scrutiny, and when it has been established that the person tendering it was really the person entitled to vote. To remedy the mistake another mistake was committed a thousand-fold more serious,—indeed the most serious error which it is possible to commit under the Act. The seal was broken, the ballot box was opened, and the ballot paper was abstracted. Before counting the votes all the ballot papers in all the boxes ought, in accordance with the provisions of the Ballot Act, to be mixed, so as to prevent the result of the voting at any particular polling station becoming known. In North Lancashire, “to save time” it is said, the votes were counted as each ballot box came in, and consequently the state of the poll in each district was at once known. The Act provides in express terms (rule 16) that there shall be at least one compartment for every 150 electors entitled to vote at the polling station. We know of one election in Scotland where there were only two compartments for 700 electors—an arrangement which was contrary to the provision of the Act, and which led to much confusion. At the same election three presiding officers were huddled into one small booth. Each presiding officer should have a separate place, otherwise the secrecy of the Act cannot be maintained. When the vote of an illiterate is taken the booth ought to be cleared: but in the case mentioned this could not be done; no one of the presiding officers having a right to clear the booth, which was the common polling-place of the three. At one of the recent elections the sheriff had provided forms of declaration to be taken by persons blind or physically incapacitated. Any one who chooses to read rule 26 will see that there is no authority for administering such a declaration. When presiding or returning officers undertake the duties of their position it is surely not too much to expect that they should look into the statute under which they are to act. The diversities of judicial opinion as to the validity of a ballot paper are also a matter for wonder and amazement. We have seen the diversity of view of the sheriffs of the two adjacent counties of Ayr and Renfrew as to the effect of the want of the official mark on the back of the ballot paper.

At one of the recent elections the following strange decision was given by the returning officer. On one of the ballot papers the cross extended over the line between the two spaces. The larger part of the cross was on one side of the line, but the intersection of



the cross was on the other. The returning officer held the vote a good vote for the candidate opposite to whose name the intersection was. We think this vote should have been rejected on the ground of uncertainty. It is the cross, not the intersection of the cross, which the Act directs to be placed opposite the candidate's name; and here it was partly opposite the one name and partly opposite the other.

Perhaps the most startling novelty in the way of judicial aberration is the decision of the returning officer at the Greenock election. We observe that an elector of that town has been calling the attention of Mr. W. E. Forster to this decision, by which more than 300 votes were rejected because the cross, although made on the right-hand side of the candidate's name, was made within the space for the candidate's name, and not within the square at the end, thus:—

1	SCOTT	
2	STEWART	X

Mr. Forster, through his secretary, has stated that he thinks "the returning officer was mistaken in rejecting such votes," and he knows of more than one case in Yorkshire where such votes were received without question. It may be remarked that what has been done in Yorkshire is of very little importance in a question as to an election in Greenock; because, as we shall presently see, what is law on the subject of ballot papers in England is not law in Scotland. The Ballot Act expires this year. Mr. Forster carried it through the House of Commons in 1872, and it may have been thought probable that he would be the Minister intrusted with the conduct of a bill to continue and amend it. We presume it was with this probability in view that his Greenock correspondent drew Mr. Forster's attention to the decision of the returning officer. This, however, was quite unnecessary. The Act requires no amendment on this point. In the directions for the guidance of voters the elector is simply told to "place a cross on the right-hand side opposite the name of each candidate for whom he votes," and nothing at all is said about placing the cross in the square at the end of the name. But what is of more importance in this relation is that the Supreme Court of Scotland has decided in the case of *Robertson v. Adamson* (July 5, 1876, 3 Rettie, 978) that ballot papers marked as above are quite good. The interpretation put upon the Act by the supreme tribunal is the matter which is to be regarded when future legislation is contemplated. In any bill to amend the Ballot Act it is not necessary to insert a declaration that the Court of Session is right and the Sheriff of Renfrewshire is wrong. The Court of Session will declare that itself whenever

any occasion for doing so arises. The decision of the Court of Session was right; but even if it had been wrong, a returning officer in Scotland is bound by it. The returning officer in this case either knew of the decision in the Court of Session or he did not. If he knew, he went wrong in not following it; if he did not, he went wrong in not knowing it. In all probability the defence would be the straightforward one which Dr. Johnson made when the lady asked him how he had given the definition which appears in the dictionary of the word "pastern."

There is, however, one point cognate to that we have just considered, on which the Ballot Act requires not so much amendment as a declaration of what was intended by it. In a recent article in the *Times* it is said that in some constituencies votes have been rejected where two crosses were made instead of one; which shows, says the writer of the article, that "there are purists who have more nicety than good sense." Evidently the writer of the article was not aware that such votes would be rejected in every parliamentary and municipal election in Scotland. The Ballot Act applies both to England and to Scotland; but on this head the English and Scottish Courts have given decisions diametrically opposed to each other in construing the very same words. In Scotland, in the Wigtown Burghs case (*Haswell v. Stewart*, May 23, 1874, 1 Rettie, 925) and the Musselburgh Municipal Election case (*Robertson v. Adamson*, *supra*), the latter being a judgment of seven judges, only one of whom dissented, it was held that any deviation from the directions for the guidance of voters, such as placing two crosses instead of one, putting a line instead of a cross, marking the paper on the left-hand side instead of the right-hand side of the name, invalidated the vote. In England, in the case of *Woodward v. Sarsons* (L. R. 10 C. P. 733), ballot papers of this description were held good. The English case being decided before the case of *Robertson v. Adamson*, the Scottish judges of course had the English decisions and the grounds of it fully in view when they arrived at *their* construction of the Act. The decisions of the Scottish Courts were not regarded with favour at the time they were pronounced, nor are they so regarded now. When a voter puts a double cross, or puts his cross on the left-hand instead of the right-hand side, his intention is perfectly clear, and surely that ought to be sufficient. In section 2 and rule 25 of the Ballot Act the voter is merely directed to "mark" his vote. It is only in the "form of directions for the guidance of voters in voting," to be placarded at the polling stations, that anything is said as to the manner of marking the vote. It is there said that "the voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right-hand side, opposite the name of each candidate for whom he votes, thus x." This instruction, however, is merely for the "guidance" of voters, and is merely directory, not imperative. If "directions" are not directory, what is? The argument

which prevailed in these cases was that the voter by deviating from the manner directed made a mark by which he could be identified, which according to the Act invalidates the vote; and that if such votes were accepted, the provision of the Act, the intention of which was to prevent a pre-arrangement between the voter and the candidate and his agent, would be frustrated. The answer to which is that we ought not to assume any intention on the part of the voter to afford means of identification; that in the absence of evidence of pre-arrangement one ought to assume that there was none; and further, that the deviations in question were so common that they afforded no means of identification. If there was any corrupt concert, we may be sure the peculiarity of marking adopted in order to identify would be of a less notable kind, would be of so minute a character that nobody would notice it except the person who was on the outlook for it.

The Scottish decision is not consistent with itself. Votes were held good where the mark consisted of two lines which joined but did not intersect, and so was not a cross at all; and where "feet or claws" were appended to the cross, thus making it something in the form of the letter X. If one irregularity in the mark is to vitiate the vote, why should not another? If the direction is to be so strictly obeyed, it ought to be so in every particular. The voter is told to mark his vote with the pencil provided in the compartment. Yet ballot papers were held good where the paper was marked in ink. The voter is told to make a cross thus  $\times$ . Why should not a cross of a different description, thus  $+$ , invalidate the vote too? Votes were held good where a straight line was drawn after the cross. If the addition of another cross to that which the voter is directed to make vitiates the vote, because it is a mark by which the voter may be identified, why should the addition of a line, which is liable to the same objection, not have the same effect?

In the English case *Woodward v. Sarsons* it was held, generally, that a ballot paper so marked as to show for whom the voter intended to vote ought to be counted, however much the "directions" in the Ballot Act were contravened. Ballot papers accordingly were held good where the cross was on the left-hand side of the candidate's name, where there were two crosses instead of one, where there was a star, a straight line, or an oblique line instead of a cross; and where a pencil line was drawn through the name of the candidate not voted for. We have made some unfavourable comments on the decisions of the Scottish Courts. Although we prefer the general view taken by the Court of Common Pleas, we are not sure that the English judges have not gone a little too far the other way. The remark made in *Robertson v. Adamson* by Lord Deas, the only one of the seven judges who favoured the English view, that the directions in the statute must be substantially complied with, deserves consideration. Nor do we

intended to be a handy guide to returning officers, is, as regards districts of burghs, quite misleading, and is in disconformity with the provisions in the body of the Act. Again, in the first section of the Act it is stated that the nomination paper is to be delivered to the returning officer by the candidate or his proposer *or* seconder. In the "form of notice of parliamentary election" in the second schedule it is said that the nomination paper must be delivered by the candidate or by his proposer *and* seconder. It is provided that the ballot paper shall be stamped on both sides; yet, as already pointed out, the want of the official mark on the back, and the back alone, vitiates the vote. Either it is necessary or it is not necessary to have the official mark on both sides. If it is necessary, the want of the official mark on either side should vitiate the vote. If it is not necessary to stamp the ballot paper on the front, why encumber the operation of polling with a useless formality?

The provision for preventing the identification of the voter is not complete. Section 2 enacts that any ballot paper "on which anything except the said number on the back is written or marked by which the voter can be identified shall be void and not counted." A voter can easily afford means of identification without writing or marking anything *on* the ballot paper. He may, for example, fold up his visiting card, or the voting card sent by a candidate, or a slip of paper on which his name is written, inside his ballot paper. At one of the recent elections, at the counting of the votes a voting card was found enclosed in the ballot paper.

The sections and rules of the Act specially applicable to Scotland are exceedingly ill framed, and appear to have been drawn by some person who had quite an inadequate knowledge of the previous election statutes. With regard to some of these it is a mild expression to say that it is impossible to make head or tail of them. In rule 57 it is said that the expression "agents of the candidates" means agents appointed in pursuance of section 85 of 6 and 7 Vict. cap. 18. In looking into this Act, we find it applies only to England and Wales. A distinction, and one for which we can discover no adequate reason, is made between Scotland and the rest of the kingdom as to the custody of the ballot papers. By rule 38 it is provided that the returning officer shall forward the ballot papers and other election documents to the Clerk of the Crown in Chancery, who (rule 39) retains them for a year, and then, unless otherwise directed by an order of the House of Commons or of a superior court, causes them to be destroyed. Rule 59 provides that in Scotland these documents shall be transmitted to the Sheriff-Clerk of the county, and retained by him in like manner. If, for the sake of facility of access to these documents by a Scottish elector questioning the election, it is thought necessary to substitute some Scottish official for the Clerk of the Crown in Chancery, then the substitution should have been of an official resident in Edinburgh, where the Superior Courts are. Certainly there is

great inexpediency in committing the custody of these documents to a local man. The question whether a sheriff-clerk is entitled to make a charge against the candidates for his services at an election is one which has led to much discussion, and rather warm discussion; and different views have been adopted in different counties. This is a matter about which there ought to be no dubiety, and a very brief declaratory clause would settle the question.

These are only a few specimens of the omissions and the incongruities and inconsistencies of the Act. If further illustrations were required they might be multiplied to an extent far beyond our space.

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## TREASON AND TRIALS FOR TREASON.

### NO. II.

THE mode adopted to trap the Queen of Scots belongs rather to history than to any narrative of judicial proceedings, but may be mentioned briefly here. "The various plots that had been formed to overthrow Elizabeth," says Mr. Bund, "having failed, and Mary Stuart being still suspected of hatching new treasons, Elizabeth's ministers in their turn determined to meet treason by treason and to plot against Mary." This they did with the assistance of the turncoat Gilbert Gifford, a Jesuit, whose relations being all genuine adherents of the Catholic cause, rendered him free from suspicion. He got a new set of ciphers introduced for the secret correspondence between the queen and her friends, the key to which was duly supplied by him to Elizabeth's Government, and he established the mode of communication amongst the conspirators. All was now patent, and it was only necessary to wait until evidence sufficient to warrant a trial had been collected. The Babbington plot to murder Elizabeth, discovered at this time, brought matters to a crisis. This plot fitted in so admirably with the scheme of her ministers that it has been thought by some to have been devised by them with the view of implicating their intended victim, and the genuineness of Mary's letter to Babbington approving of his plot has been questioned. Mr. Bund suggests that "it is quite possible that the letter may be partly genuine and partly forged; that Phillips made additions to the letter to compromise Mary. Against its genuineness is the fact that the original letter was not forthcoming." Seizing the opportunity when Mary was absent from her prison on a hunting expedition, the authorities took possession of all her papers, and then the crafty Elizabeth wrote to her inviting a confession of guilt, which, had it been given, there can be little doubt would have been used against her. Mary, however, preferred to leave the proof to her accusers. The



minor conspirators were arrested, tried, and pressed into confessions. In the case of one of them, Abington, the plea was taken that under one of Elizabeth's own statutes two witnesses brought face to face with the accused were necessary to support an indictment of treason. In answer the Solicitor-General said, "See how they would acquit themselves for want of witnesses; and if it should be as they would have it, there could never any treason be sufficiently proved. The statute 1 Elizabeth is so—the overt act must be proved by two witnesses; but the statute 25 Edward III. is, 'who shall imagine;' how then can that be proved by honest men, being a secret cogitation that lieth in the minds of traitors?" Another of the prisoners is described as seeming to be "a very clownish, blunt, wilful, and obstinate Papist." They were all executed with the usual horrible cruelties dealt out to traitors. Then came up for trial the unfortunate Mary, concerning whose guilt such a controversy has raged, and probably will for ever rage. There seems to have been considerable difficulty in knowing how to proceed. Very many persons of all ranks had been tried for treason during that century, but this was the first reigning sovereign, and, helpless as she was, her position rendered it necessary carefully to consider what course to adopt. In the year 1583 a number of persons had entered into a bond of association, by which they pledged themselves to prosecute with arms "all who should attempt any act or counsel to the harm of the queen's person, and to prosecute to the death any pretended successors on whose behalf such an attempt should be made." Mary had joined the association, and so prepared the way for her own trial. For it had been legalized by the Act 27 Elizabeth, c. 1, which also provided for a commission, composed of privy councillors and peers of the realm, to try the offences against which this association was aimed. And it was by such a commission that the conduct of Mary was now to be investigated. Mr. Bund, who holds a very strong opinion against the legality of the proceedings in other respects, says, "With regard to Mary's protest against the jurisdiction, it must be borne in mind that the statute 27 Elizabeth, c. 1, was passed to carry into effect and give a legal sanction to the bond of association; that Mary, by signing that bond, had certainly assented in some degree to the Act, and she thereby assented to all measures necessary to make it effectual." Certainly the trial or inquiry into the guilt of the queen was an extraordinary event which could only be warranted by extraordinary circumstances. The Court, the place of trial, and the prisoner all startle us as unusual. A solitary woman, without advocate or friend, has her residence invaded by a body of men representing the legal ability and statecraft of England. They have already decided upon the question of her guilt, and the meaning of the proceedings prolonged through successive days, if indeed they have any meaning, is merely to force from the victim by a process of moral torture that confession which would give a more decent



pretext for the dismal tragedy to follow. There are protests by the queen, and tears, of which the report informs us she shed plenty, and there are counter-protests—Walsingham calling God to witness “that as a private person I have done nothing unbecoming an honest man,” and the prisoner beseeching him not to be angry, and assuring him that she is satisfied. How touching is the protest with which she met the advance guard of her persecutors who visited her before the commission opened! “I am an absolute queen, and will do nothing which may prejudice either mine own royal majesty, or other princes of my place and rank, or my son. My mind is not yet dejected, neither will I sink under my calamity. I refer myself to those things which I have protested before Bromley, now Chancellor, and the Lord De la Wane. The laws and statutes of England are to me most unknown; I am destitute of counsellors, and who shall be my peers I am utterly ignorant. My papers and notes are taken from me, and no man dareth stand forth to be my advocate. I am clear from all crime against the queen. I have excited no man against her, and I am not to be charged but by my own word or writing, which cannot be produced against me.”

The trial, if it deserves the name, resembles others of the period. There is the usual absence of witnesses, their place being supplied by the confessions of those who had already suffered—abundance of treasonable matter deposed to, but nothing brought home to the prisoner. The following remarks of Mr. Bund seem quite justified by the record of the proceedings: “After making every allowance in favour of the jurisdiction of the Commissioners, nothing more disgraceful to our law than the trial of Mary Stuart can be found. In the first place, as she pointed out, the Commissioners had only power to go into the question as to conspiracy against the queen’s life; to prejudice this question a host of statements were made as to her dealings with Spain which had nothing to do with the question of the queen’s life, and into which the Court had no power to go. None of the original letters were produced, and no evidence was given to prove that the queen had ever received or sent the letters. Parts of various confessions, the parts that told against Mary, were picked out and read; upon this evidence given when Mary was present there was really no case against her, and the Commissioners were, it seems, unable to arrive at any determination. She was condemned upon the evidence of two persons, given behind her back, before a tribunal composed of her bitterest enemies, of men like Walsingham, who had been spending their time in entrapping her into guilt; like Burleigh, her greatest enemy, and before this tribunal she was wholly unrepresented.”

The treason of Elizabeth’s favourite, Essex, was directed not against the queen, but against her ministers. And yet by the construction of the lawyers he was held guilty of compassing her

death. The question put by the commission which tried him to the Chief-Justices Popham and Anderson, and the Chief Baron Peiram, was, "Does every rebellion necessarily in law imply a compassing the death and deprivation of the king; for seeing the rebel would never suffer the king to live and reign, as he would punish and take revenge for his treason and rebellion?" This question was answered in the affirmative, thus making rebellion and killing the king synonymous terms.

The next reign, that of our own King James, was also, as we all know, rich in plots and treason trials. Again the English Catholics at home and abroad found themselves opposed by a strong Protestant government, and compelled to scheme for its destruction after their favourite methods. It is indeed somewhat strange that by this time they had not lost heart, for all their previous conspiracies had ended in nothing but the torture and death of the most devoted adherents of their cause, and by the death of Mary they had lost their natural head. But the Catholics, who would have welcomed her at a sacrifice of their consistency, would not acknowledge any legal title in her son. And so far the statutes of both Henry VIII. and Elizabeth were on their side. According to the Jesuits there were at least fourteen persons who could show a better title to the crown of England than that possessed by the King of Scots. In his accession we see indeed a striking proof of the strength of Protestantism in the beginning of the seventeenth century, and the determination of the people to maintain those principles which had, in spite of all her cruelty and tyranny, made Elizabeth great and the country under her prosperous.

So many Acts had already been passed relating to treason by the Tudor kings, that little remained in the way of original legislation for the Stuarts to do. Under the first dynasty there were made no less than sixty-eight statutes, and to these only eleven were added under the second. But it was necessary again and still further to strengthen the law against "Jesuits, seminary priests, recusants, etc.," and in 1 Jac. I. c. 4, we have a fresh specimen of religious persecution based upon political necessity. Every inducement was held out for the conversion of recusants, and a tender regard exhibited for the orthodoxy of their heirs. The object was to stamp out Popery amongst the rising generation. No child was to be sent abroad to be educated in the Popish religion, and those who were abroad were to return and submit themselves within a year; and lest the evil thing should lurk within them, all private schools in this country were prohibited. The publication of this statute was followed by the Gunpowder Plot, for the timely discovery of which Catholics were compelled by a subsequent statute to perform an annual thanksgiving. According to the Act, the conspiracy would have succeeded "had it not pleased Almighty God by inspiring the king's most excellent majesty with a divine spirit to interpret some dark phrases of a letter showed to his majesty,

above and beyond all ordinary construction, thereby miraculously discovering their hidden treason not many hours before the appointed time for the execution thereof." It must have been difficult for a loyal Parliament to find fit expression for their feelings. "The late most barbarous, monstrous, detestable, and damnable treasons" is the feeble attempt of 3 Jac. I. c. 2. Of course there followed many new provisions against recusants. Every man whose wife refused to receive the sacrament had to pay £10 a month to keep her out of prison. What curious domestic scenes there must have been in those days!

The most interesting trial of the reign is perhaps that of Sir Walter Raleigh, who was tried upon a charge of being concerned in what was known as the Main Plot. It is interesting not only because of the gallant and romantic career of the accused, but as a specimen of judicial proceedings at this period, exhibiting, we may observe, no improvement upon those to which we have already called the attention of our readers. It was in this case that Coke, then Attorney-General, made a speech long remembered for its virulent abuse of the unfortunate prisoner, left as usual to his own defence. Take this as a specimen of an opening speech by counsel to the jury—Coke is defining treason: There is treason in the heart, in the hand, in the mouth, in consummation, and compared it *in corde* to the root of the tree, *in ore* to the bud, *in manu* to the blossom, *in consummatione* to the fruit. You of the jury then, the greatness of the treason is to be considered in these two things, *determinatione finis* and *electione mediorum*. This treason excelleth in both, for it was to destroy the king and his progeny. These treasons are said to be *crimen læsæ majestatis*, the first-fruit, and may be termed *crimen extirpandæ regię majestatis et totius progeniei suæ*. I shall not need, my Lords, to speak anything concerning the king, nor of the bounty and sweetness of his nature, whose thoughts are innocent, whose words are full of wisdom and learning, and whose works are full of honour, although it be a true saying, *numquam nimis quam satis*.

When Raleigh says, "You tell me news I never heard of," Coke replies, "O sir, do I? I will prove you the notoriousest traitor that ever came to the bar." And again, "I will prove all. Thou art a monster, thou hast an English face but a Spanish heart. . . . I will track you out before I have done. . . . You are the absolutest traitor that ever was." Speaking of Lord Cotham (alleged to be in the conspiracy), Coke continues, "All that he did was by thy instigation, turn viper, for I know thee, thou traitor."

Raleigh: "It becometh not a man of quality and virtue to call me so. But I take comfort on it; it is all you can do."

Coke: "Have I angered you?"

Raleigh: "I have no cause to be angry."

Then the Chief-Justice intervenes: "Sir Walter Raleigh, Mr. Attorney speaketh out of the zeal of his duty for the service of the king, and you for your life, be valiant on both sides."

The evidence led relating to treasonable sayings and doings of Raleigh was precisely of the nature already described. The important witnesses were not produced, but their confessions read and the wildest hearsay admitted. Thus one man, a pilot, was examined, who stated that when in Lisbon he was asked if the King of England was crowned, yet he had said "No," and then some one had remarked, "He never will be, as Cotham and Raleigh will cut his throat before that day comes."

The prisoner asked very naturally what was the object of this, and Coke's answer was, "To prove that treason has wings."

There was quite enough of evidence to convict had the quality been sufficient, but in the opinion of judges and counsel it was all that could be desired.

When Raleigh pleaded that as he was to speak for his life, he should have the last word, Coke said, "The king's safety and your clearing cannot agree. I protest before God I never knew a clearer treason. I will lay thee upon thy back for the confidentest traitor that ever came at a bar." Even Cecil interposed and suggested patience, which put Coke into such a rage that he refused to speak any further, and had to be coaxed into a better humour before he would address the jury. Then we have the following passage of arms:—

Coke: "Thou art the most vile and execrable traitor that ever lived."

Raleigh: "You speak indiscreetly, barbarously, and uncivilly."

Coke: "I want words sufficiently to express thy viperous treasons."

Raleigh: "I think you want words indeed, for you have spoken one thing half-a-dozen times."

Coke: "Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride."

Raleigh was of course condemned; and we all know what followed—how he lingered for fourteen weary years in the Tower—how he was then sent under a commission from James himself as leader of an expedition to work gold mines in Guinea—how the expedition failed, and the unfortunate leader upon his return found his old sentence revived, and an order craved in King's Bench for his immediate execution. Raleigh pleaded that the king's grant of a commission was tantamount to a pardon, but he pleaded in vain, and on 29th October 1618 he was executed in Old Palace Yard.

"Technically," says Mr. Bund, "the Court was right as to the effect of Raleigh's commission, but it is difficult to find words to express sufficient indignation against James for his conduct." There can be little doubt that Raleigh's old and forgotten treason had nothing to do with his death. He fell, it is to be suspected, a victim to a desire on the part of his contemptible sovereign to please Spain.

The case of *Peacham*, which occurred also in this reign, is associated with the name of Bacon, and we find that philosopher endeavouring, in the interests of the king, to overcome the scruples

of the English judges. Peacham was a clergyman in Somersetshire, in whose house was found the manuscript of a sermon containing expressions unfavourable to James. The writer was first examined upon special interrogatories. From the nature of these questions it seems to have been thought possible that Peacham was privy to some plot. Thus he was asked, "What moved you to write, The king might be stricken with death on the sudden or within eight days, as Ananias or Nabal? Do you know of any conspiracy or danger to his person, or have you heard of any such attempt?" The Commissioners empowered to interrogate had, however, to report that although examined "before torture, in torture, between torture, and after torture," nothing could be drawn from the accused. The king then directed Bacon to ascertain the feeling of the various judges upon the course to be next followed. This seems to have given offence to Chief-Justice Coke as an unconstitutional proceeding, and he resisted for some time being thus dealt with, but at last gave in, as all had to do in those days when royal commands were concerned. Bacon writes to the king, "I do think it most necessary, and a point principally to be regarded, that because we live in an age wherein no counsel is kept, and that it is true that there is some bruit abroad that the judges of the King's Bench do doubt of the case that it should not be treason, that it be given out constantly, and yet as it were a secret, and so a fame to slide, that the doubt was only upon the publication, in that it was never published, for that (if your majesty marketh it) taketh away or least qualifies the danger of the example, for that will be no man's case." The report of the subsequent trial is thus given: "Edmund Peacham was indicted of treason for divers treasonable passages in a sermon which was never preached or intended to be preached, but only set down in writing and found in his study. He was tried and found guilty, but not executed. Note that many of the judges were of opinion that it was not treason." Peacham died in prison. James himself wrote a statement concerning this case under the heading, "The true state of the question, whether Peacham's case be treason or not." It is quaint and ingenious, although hardly calculated to increase one's respect for the British Solomon. In arguing that Peacham's libel was an overt act, the sermon being intended for publication, he says, "Nay, he confesseth that in the end he meant to preach it, and though for diminishing of his fault he alleges that he meant first to have taken all the bitterness out of it, that excuse is altogether absurd, for there is no other stuff in or through it all but bitterness, which being taken out it must be a quintessence of an alchimy spirit without a body, or Popish accidents without a substance; and then to what end would he have published such a ghost or shadow without substance, *cui bono?* and to what end did he so farce [stuff] it full with venom only to scrape it out again? but it had been hard making that sermon to have tasted well that was once so spiced *quo semel est imbuta recens,*" etc.



The following remarks of Mr. Bund on the position of the English judges of this period are worthy of note: "One point indirectly connected with the trials for treason in this and the subsequent reigns must be noticed, as it had a very marked effect upon the way in which trials for that offence or for any matter in which the Court was interested were conducted—the positions of the judges. It must never be forgotten that the judges of the Stuart kings did not occupy the same positions as the judges of the present day; they were not regarded as the administrators of justice, but as royal officials appointed to carry out the royal will; they were not selected on account of their learning, their talents, their professional position, but on account of the favour in which they stood at Court and the belief that they would carry out the orders of the Court. Their position rested solely on Court favour, and they had been appointed by this means, so they relied upon it for the continuance of their appointments."

When Chief-Justice Montague was appointed in room of the offending Coke he was reminded by the Chancellor of the text, "He putteth down one and setteth up another"—a text, it was added, "to be remembered and feared of all that are in judicial places." Bacon told another judge "to consider that the king's prerogative is the law, and the principal part of the law—the first law or *pars prima* of the law." Coke was removed because he was not found sufficiently pliant, and Bacon wrote to the king in view of his dismissal: "Now upon this change, when he that letteth is gone, I shall endeavour to the best of my power and skill that there may be a consent and united mind in your judges to serve you and strengthen your business, for I am persuaded that there cannot be a sacrifice from which there may come up to you a sweeter odour of rest than the effect whereof I speak."

At the same time, even in the reign of James, we find an improvement in the administration of justice, and the idea of the judge as it is received amongst us beginning to be developed.

By the time of Charles I. we observe a change in the character of the treason and of the traitors. There is no longer on the part of the Crown that incessant fear of plots hatched abroad, of priests and Jesuits, which we see exhibited during the reigns of Elizabeth and James.

At last the Protestant dynasty is securely established, and Catholics have now to turn their hopes towards the conversion of the reigning family and not their overthrow. But the difficulties with which the previous sovereigns had had to contend doubtless went far to excuse their arbitrary proceedings in the opinion of their subjects; necessity proverbially can dispense with law. In more settled times it soon became apparent that even the Crown was not above criticism. The tables are gradually turned, and at length we witness the king himself tried and condemned for treason.

W. G. S. M.



## REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

So late as the passing of the Merchant Shipping Act of 1854 no code had been established for the guidance of shipmasters in difficult circumstances, and collisions frequently arose from different views being taken as to the course to be steered to avoid a collision. Courts of law found it impossible in many cases to say that fault lay with the one vessel rather than with the other, when each claimed to have followed a rule of practice or of seamanship which was not recognised by the other. It is true that in 1840 the Trinity House Corporation had endeavoured to establish a general rule by the issue of an order stating the recognised rule for sailing vessels in certain cases, and laying down for the first time the rule that crossing steamers should port their helms. The Admiralty Court in England accepted this order as prescribing the proper course to be followed, but as the order had not the force of law, it was not always obeyed by shipmasters, and in the Courts occasionally successful attempts were made to have its obligation disregarded. To remedy this state of matters provisions were introduced into the Merchant Shipping Act of 1854, but as these were not found to be satisfactory they were repealed by the Merchant Shipping Act Amendment Act (1862), which substituted other rules, and at the same time enacted "that her Majesty may from time to time on the joint recommendation of the Admiralty and the Board of Trade by Order in Council annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution therefor." The regulations of the Act of 1854, as well as those of the Act of 1862, were of course only binding on British ships; but Parliament recognising the importance of there being only one rule of road at sea, gave power to the Crown to issue Orders in Council rendering the ships of any foreign country which should give its consent subject to the operation of these regulations. Doubts from time to time arose as to the construction of the regulations contained in the schedule to the Act of 1862, or rather of the very slightly modified regulations which were substituted for them by an Order in Council dated 9th January 1863. An Order in Council was accordingly issued for removing doubt and misapprehension in regard to the meaning of the two articles prescribing the course to be followed by vessels meeting end on. Although all the great maritime Powers and most of the smaller ones gave their consent to these regulations, there were occasional complaints that they were not so clear nor so complete as was desirable, and it was specially pointed out that they were defective in the provisions relating to the precautions to be taken during fogs. Indeed it was said that these provisions sometimes led to accidents instead of preventing them, and that they were apt to be interpreted in different ways by different shipmasters.

Accordingly a new series of regulations was prepared, and after having been approved by the leading Powers, an Order in Council was issued on the 14th August 1879 substituting the rules contained in the first schedule appended thereto for the regulations presently in force, and rendering them applicable to the ships of the various countries which have signified their approval of them. These regulations, in order to give time to shipmasters in all parts of the world to become acquainted with them, do not come into operation till the 1st of September 1880.

The new regulations are expressed with greater clearness and precision than the former ones. Besides a number of merely verbal alterations, such as the use of the singular for the plural, several important regulations and explanations are introduced for the first time, and will probably be of great service in diminishing the risk of collision. In the articles dealing with lights it is now provided for the first time that vessels engaged in laying or picking up telegraph cables shall carry three red lights, placed vertically one over the other, in place of the white-light, which they formerly in common with other steamers carried, and which was misleading, as it was apt to make sailing vessels rely on the rule which obliged a steamer to keep out of the way of a sailing vessel. This a steamer laying a cable could not easily do, and as cables are now often being laid or picked up on the lines most frequently traversed by merchant vessels, the risk of collision was greatly increased. Such vessels are also now to carry during the daytime three black balls as a sign that they are not under command. A very important rule is laid down for the observance of vessels which are being overtaken. The overtaking vessel's lights are of course visible to the other, but she cannot see the other's regulation lights, and the existing rules forbid a vessel to carry any other lights than the regulation ones. A shipmaster was therefore often in great difficulty as to what he should do when he saw a vessel overtaking him. In a clear night he might trust to the other vessel seeing him in time to avoid running him down, but if he showed a light he could not be sure that his signal would be understood, or that he might not be held to have contributed to the collision by breaking the rule which forbade him to carry any but the regulation lights. The new rules effectively provide for this case by directing the vessel which is being overtaken to show from her stern to the overtaking vessel a white light, or a flare-up light. Fog-signals were formerly found defective in allowing too great an interval between the blast on the foghorn or whistle and in not giving any indication of the course steered. This is now remedied by the provision that in fog, mist, or falling snow (and not merely in fog, as the present regulations direct) the intervals between the blasts on the whistle or horn are not to be more than two minutes; and further, that a sailing vessel shall indicate her course by giving one blast if on the starboard tack, two if on the

port tack, and three if the wind is abaft the beam. Sailing vessels as well as steamers are now directed to go at a moderate speed in fog, and also in mist or falling snow. For article 12 of the present regulations, which is expressed somewhat clumsily, a new article to the same effect is substituted, which gives distinct and unmistakable directions as to what is to be done in five different cases. At the same time the rule which provided that sailing vessels meeting end on or nearly end on shall both put their helms to port is omitted, as the five rules directing one of the two vessels to keep out of the way of the other provide for every possible case, and the rule as to both porting would only lead to confusion. The case of steamers is different, and the old rule is retained, that in such cases each steamer shall pass the other on the port side. Instead, however, of directing that their helms shall be put to port, it is merely provided that each ship shall alter her course to starboard, thus leaving to the shipmaster to adopt what manœuvre he thinks proper to attain that end, as it is well known that screw steamers exhibit many peculiarities of steering. The only other important alterations are, first, the provision of a series of signals on the steam-whistle by which a steamer may indicate to any vessel what course she is about to take; and second, a direction that steamships in narrow channels shall keep to that side of the channel which lies on its starboard side. This latter rule will be found of great use in narrow estuaries, where accidents such as that of the Bywater Castle and the Princess Alice frequently occur through steamers crossing unnecessarily from one side to the other. On the whole the new regulations seem to be likely to prove an improvement on those presently in force, and may be expected to lessen materially the risk of collision at sea.

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## EVIDENCE IN RELATION TO BILLS OF EXCHANGE.

IN the February number of the *Journal of Jurisprudence* we devoted a short article to the consideration of the question, "Under what circumstances is it competent to admit proof other than writ or oath to overcome the legal presumption which exists in favour of the holder of a bill of exchange?" The conclusion to which we came was that the rule which restricts such proof to writ or oath holds as strongly now as ever it did, and that to form an exception there must be either admissions or unquestioned facts going to rebut the presumption by exciting suspicion. We wish now to call attention to an important case not at that time reported, which at once contains a very clear statement of the law as it is, and also an expression of opinion by a learned judge of what that law ought to be. We refer to the case of *Jolly's Trustee v. Ferguson, Davidson, & Co.* decided by the First Division in January last.

We need not trouble our readers by any long statement of the details. The case arose out of the refusal by a trustee upon a sequestrated estate to rank the claim made by certain indorsees of a bill accepted by the bankrupt. The trustee maintained that no value had been given for this bill, which had come into the indorsees' hands as part of a proposed transaction never carried out, and should have been returned, since the transaction fell through. The appellants made an explanation in their answers, and as Lord Mure said, "if the explanation had been clear and consistent with itself, and with the written communications passing between the parties, I do not, as at present advised, think that I should have been prepared to hold that the case was one in which proof otherwise than by writ or oath should have been allowed." But it was just one of those cases of suspicious circumstances to which reference has been made, and which form the exceptions to the rule. The following is the opinion of Lord Mure upon the law relating to this subject: "Now the result of a careful examination of these cases appears to me to be this, that wherever the averments of parties on the record, as explained or admitted by the holder of a bill, are such as to show that a bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business, or are such as to lead to the inference that no actual value had been given for the bill at the time, or wherever the special facts of the case relative to the circumstances in which a holder of a bill became possessed of it, as admitted or explained by him, are such as render it desirable for the ends of justice that the inquiry into the facts should not be limited to the writ or oath of the holder, the Court have been in use, and that apart from any question or allegation of fraud, to allow proof before answer of the averments." And Lord Deas, speaking of what is necessary before such a proof can be allowed: "I have always been of opinion that to that end two things must concern. First, there must of course be averments by the defender which, if proved, show bad faith on the part of the holder; and second, there must be in the statements of the holder, or in the real evidence of facts and circumstances, or in some relative writing, something which tends to throw suspicion on him."

Lord Shand hardly differed from his brethren upon their opinion of the existing law. But he seems rather to have thought that where the question was one of *mala fides* of the indorsee in taking delivery of the bill, a proof *prout de jure* should be allowed when fraud was averred.

The existing law he, however, criticised very severely. "I cannot refrain from saying that I know nothing more unsatisfactory in the law of this country than the rules of evidence—for I cannot call them principles—which are applied in cases of this class relative to bills of exchange." The argument for a change in the law (which would, in fact, only be the adoption of the opinion of the

Mercantile Law Commission) is forcibly put by the learned judge, who points out that "the advantages of bills would, I doubt not, be completely maintained by giving full effect to the legal presumptions both of onerosity and *bona fides*, as we know is done in England, while at the same time allowing parole evidence for the discovery and redress of fraud." No doubt there appears something inconsistent with legal principle in allowing a man accused of fraud to say that unless he admits something which gives colour to the accusation, the only proof which his accuser can have is what he may have written or chooses to swear. Lord Shand says, "It seems to come to this, that the Court, looking at antecedent probabilities to be gathered from the circumstances of particular cases, says to the complainer, If the case be one in which it seems likely that fraud will be established, a proof will be allowed; if unlikely, a proof will be refused." His Lordship's objection, however, seems to strike at a number of our legal rules which extend beyond bills of exchange—to all such rules, indeed, as restrict for certain classes of cases the mode of proof. In practice, too, were the mere averment of fraud to open the way to parole evidence, it would form the plea of every needy acceptor whose sole object was to obtain delay. This difficulty might, however, be obviated by directing consignations of the amount of the bill, or some such amount as would indicate that the defence was *bona fide*.

It is unusual for a judge (at least in Scotland) to criticise the existing law, and the fact of Lord Shand having done so seems to have startled his brother Lord Deas, who drily remarked, "Whether this ought to be the law it is not for us to consider. Whether the law ought to be altered is a matter for the Legislature, not for us." But we see no reason why a judge, while bound to administer the law, and carefully prevent his own theories of what should be from influencing his interpretation of what is, should not express freely his suggestions for legal reform, suggestions which are all the more likely to have weight because of the quarter from whence they come.

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## ON TWO RECENT CASES AFFECTING WATER RIGHTS.

ON the 23rd and 24th of January last respectively were decided two cases of some interest, having reference to water rights as these are enjoyed by an upper proprietor in his relations with the heritors lower down the stream than himself. The one case more especially turned upon a mill-right servitude enjoyed by the upper proprietor, and leading to a diversion more or less permanent of the stream; and the other case had also reference to a diversion of



water by the upper heritor (in this instance no other than a local authority), and the damage caused below by this. It may be interesting to examine the cases separately, in the first instance briefly epitomizing the facts and the results, and then to take notice of the law of the matter, and the way in which these decisions have affected it.

First of all, then, we have the case of *Hunter and Aikenhead v. Aitken's Trustees* (17 Scot. Law Rep. 319). The complainers were papermakers whose mill adjoined a stream whence a supply of water was constantly required for the purpose of the manufacture. It was also essential for the papermakers to have the water clean, so a species of clear-water pond was devised to collect the burn-water, and when the stream was turbid and impure the water was not admitted into the pond. According to usual practice the paper-mill worked day and night continuously except upon Sundays. Higher up the same stream was a corn-mill, which had been since 1835 worked by water-power supplemented by steam; and for more than forty years, by means of sluices closed on Sundays, water was stored in the mill-dam, there being a continuous flow down to the paper-mill on every other day. It consequently followed that under such an arrangement the papermaker's work was not interfered with in any way. A new tenant, however, came to the mill, and in 1878 he began to close the sluices every night, giving up also the use of steam-power, and thus he stored at night the water he was to use the following day. This deprived the paper-works of the continuous flow of water in the first place, and further, it had the effect of rendering the stream dirty when the water was each morning suffered to flow over the partially-dried bed.

These, then, being the facts, the contention of the owners of the paper-mill practically were twofold. On the one hand, they objected to the alteration of the state of matters under which the sluices had been for upwards of forty years kept open save upon Sundays, or rather from Saturday evenings until Monday mornings; they objected to the alteration, involving as it did a serious loss to them in stopping the continuous working of their mill, and they also regarded it as a violation of rights secured to them by prescriptive use. Further, and beyond this, there was the second point raised by the lower heritors, namely, that the opening of the sluices each morning upon the half-dried bed of the stream raised mud and rubbish loosened from the bed by the drying process in the night, and carried this down to their clear-water pond to the serious injury of their manufacture. Let us see how these arguments fared in Court. The Lord President (after pointing out that the case was not complicated by any special questions relating to the dam itself, but turned purely upon the natural rights of the parties) proceeded, as he had done, we may observe, previously in the *Esk Pollution* case, to lay down a broad and general principle in these

terms: "The superior heritor must transmit to the inferior the water of the stream undiminished in quantity and undeteriorated in quality, unless he has acquired by *grant or prescription* a right so to deal with the water as to diminish its quantity or destroy its quality. As between two parties so situated, and apart from grant or prescription, there is no servitude at all. The superior heritor is not proprietor of a servient tenement, and the inferior heritor is not proprietor of a dominant tenement. The right to the stream which each of them enjoys is just a natural adjunct of the right of property in the banks and channel of the stream. It is a right which goes with the property, and requires no additional grant or prescription in order to its existence."

We see, then, in the principles thus laid down from those words we have italicized, where the exceptions to the general rule might be found. The natural right of the lower heritor is thus distinguished from such a right, for example, as a salmon-fishing which is obtained and enjoyed by grant, or again from any servitude such as rights of way, rights of light, and so forth, obtained by prescription. But practically what here occurred was the assertion of a servitude by the miller above and the assertion of a prescriptive right to the *status quo ante* by the papermaker below. The former said that the right of storing the water enjoyed by him was a servitude acquired by prescription for the due working of the mill, and that he was within his powers in acting as he had done; the latter pointed to a certain specific use of those storing powers in a particular manner during forty years and more, and accordingly claimed protection against any change in this mode of using the sluices. No doubt there was an effort, obscure and doubtful as regards the proof, to show some practice prior to 1835 of daily closing of the sluices; but the learned head of the Court did not think that could be considered "now, when for a period of more than forty years prior to the institution of these proceedings the water has been enjoyed by the two parties together in such a way that no one has a preference over the other, and no servitude has existed or been enjoyed by the one or the other. If ever there was such a right it has been entirely interrupted and destroyed by the long period of immunity from servitude which has been enjoyed by the papermaker down the stream." His Lordship, then, may be said to have founded his judgment upon the prescription and upon the absence of any evidence of servitude, or grant, or prescription modifying the natural rights of the party. Similarly Lord Shand quoted several passages to show how the loss of rights (even presuming here a proved right prior to 1835) may arise *a non utendo*. "Seeing," says Domat, "a service may be acquired by prescription, *with much more reason* may a freedom from service be acquired in the same way. Thus he who had a right to water both by day and night loses the use of it in the night-time if he let it prescribe." And again the same judge referred to the Digest

(L. 10), "Si is qui nocturnam aquam habet, interdiu per constitutum ad admissionem tempus usus fuerit amisit nocturnam servitutum, qua usus non est. Idem est in eo qui certis horis aquæductus habens aliis usus fuerit, nec ulla parte earum horarum." These were, of course, observations founded upon the assumption that there had been such a right of daily or nightly storage enjoyed by the proprietor of the mill formerly, but Lord Shand agreed with his brother judges in holding that there also the miller's case had failed, and that the existence of such a right had not been proved. He further pointed to the anomalous position in which a judgment in favour of the miller must place the papermaker, and put a trenchant suggestion in these words: "Take the case that the complainers and their predecessors, seeing that the water for forty years has been running in this continuous way, make their arrangements accordingly, and have mills erected on the stream in reliance on their having the benefit of the water so running, is it to be said that while they have made their arrangements upon the forty years' possession, and being in the enjoyment of the water, they are liable to have that interrupted, because during the forty years antecedent to the period of prescription the state of possession was different? I think that would be an anomalous and unfortunate state of the law, and I do not think it is the law."

As to the other point raised by the papermakers, and relating to the dirt and rubbish brought down by the stream on the opening of the sluices in increased quantity, the only judge who seems to have referred much to it was Lord Mure, who remarks that were effect or full effect given to such an argument, it must altogether prohibit the storage of water in dams at any time, because whenever the sluices came to be opened and the stored water began to escape, then (though possibly in a less degree) these consequences must ensue; so that, under the system contended for by the lower heritor in this very case, each Monday morning would witness a disastrous inflow of sand and rubbish and dirt into his ponds. The result of the decision was to establish the right of the papermaker to be protected against the innovations of his neighbour the miller; but the Court refused to give any practical shape to the second contention as to fouling the stream, for the interdict was against the use of the dam or similar contrivances to prevent the continuous flow of the water "except on Sundays, and at other times when the complainer's mill is not at work."

Next we may turn to the important case of *The Peterhead Granite Polishing Company v. The Parochial Board of Peterhead* (17 Scot. Law Rep. 344). The company had raised two actions against the Parochial Board, the one being for interdict against the latter diverting water from ground adjacent to that occupied by them to a village for the use of the inhabitants, and the other for damages for water already diverted. The facts shortly stated were that the Parochial Board had in their capacity of Local Authority

executed works to supply a neighbouring village with water, taking the supply from springs and streams above the Granite Company's works, and using thus water which if left to itself would have joined the stream whence the company drew their own supplies, and in which they had a right to the water and to a dam for the purposes of their trade. The Board were acting under the section of the Act (Public Health (Scotland) Act, 1867, 30 and 31 Vict. c. 101, sec. 89) which empowered them to acquire a supply for domestic use, and to take lands (by another clause declared to include water) for the purpose on making reasonable compensation for the water and for damage. There was further a section (116) enacting that when the amount of compensation exceeded £50 it was to be fixed as provided under the Lands Clauses Act. The Parochial Board averred that there was not in the company any interest in the water, and further they denied that any damage had been inflicted; while on the other hand the Granite Company relied on what they termed their right to "the natural flow of the water," and the failure of their opponents to fulfil all the statutory prerequisites. In coming to a decision adverse to the Granite Company the Sheriff-Depute pointed out strongly the distinction to his mind existing between a body of persons acting for the public and such a body as a railway or canal company merely promoting private interests, or at least those in the first instance. This Court did not, however, attach any stress to this view, and Lord Moncreiff observed that in the aspect in which he regarded the question "it is not necessary to hold either that the words in the interpretation clause are limited to water actually appropriated for specific use, or that every inferior heritor is proprietor of the whole water supply of the stream above. It is true that the water of a running stream is not in its component particles the subject of property, excepting in so far as it may be actually appropriated for primary uses. But it is also true, and the distinction has always been recognised, that a running stream, composed of the banks, the channel, and the water, may be and is a separate tenement to many important effects, although the component parts of the stream are perpetually shifting. But there is a manifest and broad distinction between the stream as it flows through and over the property of an heritor, and the rights which an inferior heritor has in regard to water which has never reached his land. The subject is most learnedly and exhaustively discussed in the opinion of Lord Denman in the case of *Mason v. Hill*, reported in 5 Bain and Adolphus, p. 1, where the authorities in the civil law and the law of England are most lucidly and learnedly collected. Whatever views may be taken of this ancient controversy, it is quite sufficient for my present purpose to refer to the case of *Bush v. The Trowbridge Waterworks*, in which Lord-Justice James expresses the opinion at which I have arrived, in the following

words: 'They [the Waterworks Company] entered on the channel or bed of a stream somewhere above the plaintiff's land, and there they took, by way of diversion, water for the purpose of their waterworks, which water, to put the case in the highest for the plaintiff, would in due course, if they had not so diverted it, have got down to her land, and would then, and so long as it was over her land, be water of which she was the owner and occupier in the sense in which a person is owner or occupier of a stream running through his land—that is to say, the water would have come within the ownership—and to some extent within the occupancy, of the plaintiff. But when it was intercepted by the defendants, just as if it was intercepted by any other riparian proprietor, although it might have become part of her property, the water which was actually intercepted was not her property.' This view, which is very clearly expressed, and as it appears to me is sound sense, is quite sufficient for the decision of this case."

The water had been prevented from reaching the Granite Company, taking a most favourable view of their case, and that was the outside of it. Accordingly, if they had lost thereby, their claim was one for pecuniary compensation for the injury done them by the operations of the Board. The argument was pushed far by the company, that supposing such a diversion could be permitted the Local Authority were bound to come to terms with them before actually depriving them of the water; while again the Board said that it was a question of compensation for having in the words of the Act "injuriously affected" the company's works, and that such a case could not be dealt with until the diversion had taken place, and the extent of the injury could be ascertained.

Lord Ormisdale similarly referred to the case of *Bush v. The Trowbridge Waterworks* and the confirmatory decision of *Stoke v. The Mayor, etc., of York* (L. R. 1 C. P. Div. 691), as showing that the question was one for compensation as for land injuriously affected. "The Granite Company," his Lordship added, "are only in the position of riparian proprietors having right to use the water of a stream passing their property. But they are not in any correct sense the proprietors of the stream itself, or even of any portion of the water in the stream except what they may actually have legitimately taken possession of and appropriated for their own use. But the respondents have not interfered with any such portion of the water of the stream or burn. They have not, indeed, taken or diverted or interfered at all with the water of the stream or burn as it passes the appellants' property. What they have done is merely to divert the water of two springs which find their way into the burn a considerable distance farther up than the appellants' property. How, then, could they sell to the respondents the water of these springs? The springs are not on their property, and did not belong to them at all. At the very utmost they had



only such a right to or interest in the water of the burn as every riparian proprietor in a stream from the source to the sea has." Altogether throughout the argument and also throughout the opinions of all the judges there may be clearly traced the broad principle of the decision. The effect was to disregard the whole contention of the appellants' arguing for interdict upon a broad ground, namely, that this was not the appropriate remedy for what had been suffered in the way of loss by the Granite Company. The action of the Local Authority had been undoubtedly a legal action, a legal exercise of statutory powers. There was no *direct* taking of property or interference with it, there was merely an *indirect* injury, if any, such as that contemplated by the words of the Act "injuriously affecting." Where any direct interference takes place under the Act, or where any land, or, as in the present case, water, is taken belonging to other persons, the Local Authority is bound expressly by the terms of the statute to give certain notices and proceed in a fixed mode specifically laid down, and consequently an interdict is the proper means of remedy for non-compliance. But in the present instance it was recognised by the Court that the Local Authority had legally done what they had done, that the statutory notices were not required, as nothing in the shape of property, that is, land, including of course water, had been taken, and accordingly that a claim for compensation was the only remedy, an interdict being out of the question. Lord Gifford pointed out how different the two cases were, the one of a seller under a compulsory sale, the other that of a man who sells nothing but has only a claim for incidental injury. "The water," he added, "said to be abstracted from the upper springs and streams was never in any sense the property of the appellants. It never came near them, it never was within their lands, it never was possessed by them, and never was impounded or stored by them in any way. All they can say is that it should have been allowed to reach them and to flow past them as the rest of the water does. But this is not a right of property."

It will be observed that an effect of this view of the statute and of the nature of this water is to countenance the contention that there practically are two kinds of rights in water: one a right as nearly that of property as can be, the other a mere right to compensation for a diminished supply. Taking this result into consideration, the case is certainly not free from difficulty, to which we may be permitted briefly to advert after first noticing the fate of the claim set up by the Granite Company for damages. As regards this claim for damages the Sheriff cast it out on the ground that he was precluded by the statute from considering it where the amount claimed exceeded £50, in which case it fell under the regulations provided for such questions by the Lands Clauses Act, that is to say, it must be settled either by arbitration or by a jury. "This," as one of the judges pointed out, "excludes a common law

action of damages, which is really an action arising out of tort or wrong, and not an action for compensation for injury legally and rightly caused by the exercise of statutory powers," and accordingly the appellants were put out of Court.

Reverting, then, to this question of the two kinds of rights in water, which are not badly illustrated by the two cases we have been discussing, we see that even the higher right in water called a property right, and treated as such in the statute recently quoted (by its being made a subject for the same notices and procedure as land taken in a similar manner), even this right is not quite the same as full property right when restricted by the rule laid down by the Lord President in *Hunter and Aikenhead*, or rather it may be said to be a property right limited by inherent restrictions more stringent than those attending other property rights. The inferior right discussed in the *Peterhead* case is there distinctly said not to be one of property, the water not being appropriated or preserved as in a dam; the mere appropriation was that for primary uses as it passed by, and practically what there occurred was that the village of Boddam drank at and cooked with this water, so that it was all consumed for legal primary purposes before it got any further. These speculations are somewhat kaleidoscopic in their difficulties, for if this be the way of things, what is the difference between the village doing this as under statutory powers and individuals similarly consuming the water of their own burns? Again, what really is the right to water? does it ever truly amount to property unless stored? and even then are not the owners at least as much burdened by other coexistent rights as they were before?

To enter further into such questions would involve an examination of many authorities and of somewhat contradictory *dicta*, and it is not within the compass of any ordinary article that this could be done, but should opportunity occur we may perhaps recur to these moot points hereafter.

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## VOTING AT UNIVERSITY ELECTIONS.

SOME interesting and some novel questions as to the validity of voting papers, as to the duty of persons tendering voting papers, and as to the proper functions of the Pro-Vice-Chancellor (the name given in University elections to the official who in other elections is styled the presiding officer) have cropped up in the recent University elections in Scotland. It may be of advantage to consider these with more deliberation than it is possible to give during the hurry of the poll, when questions which are as difficult as they are novel must be determined almost on the spur of the moment.

One of the most important questions which arose at the election

of a representative for the Universities of Edinburgh and St. Andrews was this: Is a voting paper valid which is signed outwith the United Kingdom of Great Britain and Ireland and the Channel Isles? This question was considered to involve two separate questions, to which the same answer was not necessarily to be returned. A voting paper may be signed outwith the territory specified, but within the British dominions, or it may be signed in a foreign state. A further question was raised whether, if signed in a foreign state, the requirement of the University Elections Acts that it shall be signed before a Justice of the Peace is sufficiently complied with by its being signed before a British consul, who by an Act passed in the sixth year of the reign of George IV. is entitled to take declarations as a Justice of Peace might do. Voting papers were accepted which were signed in Gibraltar, Corfu, Pau, St. Petersburg. We do not think it necessary to consider these sub-questions, because we have no doubt about the answer to the main and leading question. The Scottish Reform Act of 1868 (31 and 32 Vict. c. 48, sec. 4) makes the provisions of the University Elections Act of 1861 (24 and 25 Vict. c. 53) applicable to elections in the Scottish University constituencies created by that Act. The latter Act allows electors, "in lieu of attending to vote in person, to nominate any other elector or electors of the same University . . . to deliver for them at the poll voting papers containing their votes, as by this Act provided." Then it goes on to say, "Such voting paper . . . shall . . . be signed by the voter in the presence of a Justice of Peace of the county or borough in which such voter shall be then residing." The justice attests the fact of the voting paper being signed in his presence by signing a certificate in the form provided by the Act "with his name and address in full," and stating "his quality as a Justice of the Peace for such county or borough." It seems clear that the Justice of Peace here contemplated is a Justice of Peace for a county or borough of the country for which the Act was passed, and of the country to elections for the Parliament of which the Act is intended to provide. When the Legislature of Great Britain and Ireland speaks about a Justice of the Peace, it must, unless there is something said expressly to the contrary, be assumed to mean a Justice of the Peace for a county or borough in Great Britain or Ireland. And in the same way we must hold that the county or borough referred to is a county or borough of Great Britain or Ireland. The Legislature has no legislative cognizance of any other justices or counties or boroughs. In the 4th section of the Act of 1868, no doubt, it is provided that a voting paper may be signed by a voter "being in one of the Channel Islands in the presence" of certain officers therein specified, who "shall have all the powers of a Justice of the Peace under" the University Elections Act, 1861. But this is an addition to the ordinary provisions—an exception to the rule—a special provision for the convenience of voters who may happen to

"be" in one of the islands closely adjacent to, though outwith, the electoral area of Great Britain and Ireland. If voting papers were received which were signed in a foreign country or in a British possession, we should be landed in endless practical difficulties. How do we know that there are any Justices of the Peace in Gibraltar? How are we to know whether Gibraltar is a county, or a borough, or either? As regards places further afield and beyond the British dominions, St. Petersburg for example, we do have a strong suspicion that it is neither a county or a borough, and that there are no functionaries called Justices of the Peace there.

It does not seem possible to know from the voting paper where it has been signed. According to the Act the elector must sign before a Justice of the Peace for the county or borough "in which such voter shall be *then* residing." In the form of voting paper we have this: "(Signed) A. B. of [the elector's place of residence to be here inserted]." But the "place of residence" here referred to is not, we think, necessarily the place referred to in section 1 of the Act, the place where he is *then* residing. Suppose an elector whose usual residence is in Moray Place, Edinburgh, and who is so described on the register, happens to be on a visit for a week at Kirkintilloch, he could not sign "A. B. of Kirkintilloch." And if he did, how could he be identified as the person described on the register as residing in Moray Place, Edinburgh? The justice who attests the voting paper also appends to his signature his place of residence. But this gives no clue either to the place where the voting paper has been signed. In section 1 of the Universities Election Act it is provided that the justice shall sign the attestation "with his name and address in full," and in the form of attestation we have this: "J. N. of [the justice's or other officer's place of residence to be here inserted], a Justice of the Peace for . . . ." The place of residence here is obviously the "address" referred to in section 1; and the justice ought to append to his signature, not the place where he may happen to be, but his usual place of residence. Take this case. A voter whose "place of residence" is Edinburgh happens to be at the time he signs his voting paper residing at Stranraer, and signs his voting paper before a Justice of the Peace in Stranraer. He signs "A. B. of Edinburgh." The justice in whose presence he signs is a justice for the county of Wigtown, and his usual place of residence is Edinburgh; but he happens to be at Stranraer, which is in the county for which he is a justice. He signs "J. N. of Edinburgh." All this is quite in accordance with the statute; but nobody could find out from the voting paper that the voting paper had been signed in Stranraer, and indeed would be led to believe that it had been signed elsewhere.

An objection of very rare occurrence at elections was raised at the poll in Edinburgh University, viz. that the voter was an alien.

A voting paper signed by a medical graduate of Edinburgh, Count Orloff Davidoff, described in the register as residing in St. Petersburg, was tendered. The objection was made that the gentleman was not a British subject; but no admission to this effect was made by the tenderer of the voting paper. It is clear law and clear sense that an alien is under a legal incapacity to vote in the election of a member of Parliament. "Count Orloff Davidoff of St. Petersburg" has a decidedly Muscovite twang about it; but it will not do to decide a question as to nationality or citizenship on the suspicion excited by a name. There was at one time a surgeon in the British army of the name of Palæologus. It turned out that he was not a Byzantine but a true Briton. Some years ago there was in the London Directory (which is a repertory for singular names) the name of a Mr. Gotobed. If this gentleman had claimed to be the original of "the sleepless soul that perished in his pride," you might have had a strong suspicion that the pretension was unfounded; but it would have been highly improper to act on the suspicion alone and without any legal evidence; and in the same way, there being no legal evidence that Count Orloff Davidoff of St. Petersburg was not the genuine John Bull after all, the Pro-Vice-Chancellor, not feeling himself entitled to act on a suspicion approaching to a certainty, recorded the vote.

Another question which arose was as to the right of a dead man to vote, or rather as to the duty of the person intrusted with a voting paper on being apprized that the voter was dead. An elector who had signed and transmitted his voting paper died in London before the commencement of the poll. The case would have been exactly the same if he had died during the poll, but before the voting paper was tendered. The announcement of the death and a biographical notice of the deceased appeared in the newspapers. The fact of the death was notorious. The voting paper was tendered. The objection was taken that the voter was no longer alive. No admission of the death was made, and the Pro-Vice-Chancellor, having no legal evidence of the fact before him—a statement in a newspaper not being evidence—had no alternative but to record the vote. Of course such a vote is bad, and would be struck off on a scrutiny. A dead man cannot vote any more than he can play the fiddle. He cannot vote at a University election any more than at any other election. No doubt a voting paper had been signed, giving some person or persons named therein a mandate to deliver the voting paper at the poll. But death recalls this as it recalls other mandates. The privilege accorded to University electors of voting by means of voting papers saves the trouble of personal attendance, but it does not dispense with the necessity of physical existence. It may be as well to remember that according to the University Elections Act, 1868, the person who in virtue of the nomination contained in the voting paper delivers it at the poll requires to make a declaration as follows: "I solemnly declare that this is the voting



paper by which the said A. B. [the voter] *intends* to vote," etc. The voter could not *intend* to vote or intend to do anything else, being dead. The Act provides that "any person falsely making any such declaration as aforesaid shall be guilty of a misdemeanour [in Scotland 'a crime and offence'], and punishable by fine or imprisonment for a term not exceeding one year." It is not creditable to the character of a University elector, who must be presumed to be a gentleman of position, intelligence, and education, that he should tender the vote of a man whom he has good reason to believe is dead. If University elections are conducted in this fashion, the character of University electors and University elections will not be raised in the eyes of the general public. And as we have seen, proceedings of this kind are a little dangerous. When a person empowered to deliver a voting paper learns from a statement in a newspaper, or has other probable evidence, that the voter is dead, if he has any doubt about the fact his clear duty is to delay and inquire. In the case referred to, in the course of a couple of hours and at the expense of a couple of shillings for a telegram to London and a telegram back, the fact could have been ascertained beyond dispute.

A question has been raised whether an elector who has a qualification in each of two Universities conjointly returning a member of Parliament can vote in each. We have seen a statement in one of the daily newspapers that an elector did think himself entitled to do so, and did vote in each. We regret to say that it is only in a University constituency that anybody would have any doubt about the matter. Take any ordinary voter, a butcher, or baker, or undertaker, or candlestick-maker, and he would scout the idea that he was entitled to vote twice in the same election. A constituency, though combining many places, is a *unum quid*. If a man has a qualification in Peeblesshire and another in Selkirkshire, he has only one vote in the election of a member for the united counties. If a man has a qualification in two or three of the Kirkcaldy district of burghs, he has still only one vote. If a man has a qualification in each of the thirteen wards of Edinburgh, he has only one vote for a member to represent the city in Parliament. If there was any doubt about the matter, the Ballot Act settles the doubt. In Part III. it is provided (section 24) that "a person shall . . . be deemed guilty of the offence of personation who at an election for a county or borough or at a municipal election applies for a ballot paper in the name of some other person," etc., "or *who having voted once at any such election applies at the same election for a ballot paper in his own name.*" Section 27 enacts that "this part of this Act . . . shall apply to an election for a University or combination of Universities." It is true that in University elections there are no ballot papers; but the meaning of the clause making the definition applicable to University elections is quite clear. Section 24 enacts that "the offence of personation . . . shall be a felony, and any

person convicted thereof shall be punished by imprisonment for a term not exceeding two years, together with hard labour." The option of a fine is not given. It is also provided that "it shall be *the duty* of the returning officer to institute a prosecution against any person whom he may believe guilty of personation." Suppose the unfortunate man who has voted twice should happen to be a professor. It would be a heart-rending spectacle to see the Principal of a University instituting a prosecution for personation against a professor—the punishment of which offence is imprisonment with hard labour—to which the professor, being a professor, has never been accustomed. It is very sad; but the Act says it is the duty of the returning officer.

In the attestation of the justice it is said, "Signed in my presence by the said A. B., who is *personally known to me*." A question has been raised whether a justice would be entitled to append such an attestation to the voting paper of an elector whom he had never seen before, but who had been introduced to him by a common friend who could vouch for his identity. We think he would. In such a case the voter is personally known to the justice. Personal knowledge is a matter of degree. Its duration may vary from five minutes to fifty years; and nothing is said in the statute about the length of its existence. A case has occurred where the justice in attesting the voting paper did not say, "who is personally known to me" (the expression used in the statutory form), but "who is personally known to me *through a friend*." Such an attestation is perfectly good. *Superflua non nocent* is a maxim well known to the law; and the Universities Election Act states that the attestation shall be in "the form or to *the effect* prescribed" in the schedule.

The following case presents a little difficulty. A voting paper was tendered, but objection to its reception was taken on the ground that it bore no date. The Pro-Vice-Chancellor therefore rejected the paper, and rightly so; because if the voting paper does not contain the particulars prescribed by the Act of Parliament, in other words, if the voter does not implement the conditions on which the Act allows his personal presence to be dispensed with, the Pro-Vice-Chancellor has no option. The Pro-Vice-Chancellor has no more right to dispense with what the Act requires as a substitute for personal attendance than an ordinary presiding officer has to dispense with personal attendance itself. A new voting paper was prepared in proper form. It was tendered, but was rejected because the voter had already voted. This, at first sight, appears rather hard upon the voter, and it might be argued that the first voting paper was a nonentity, and ought not to be regarded. The answer to which, we presume, would be that by section 4 of the University Elections Act of 1861 voting papers rejected on the ground of informality are to be filed and kept by the officer intrusted with the care of the poll-books, etc. The voting paper

not know, the Pro-Vice-Chancellor being entitled to decide upon objections and to reject voting papers, is entitled to make his decision upon what evidence he has, such as it is. We do not think it would be practicable to lead evidence during the course of a poll; because there are many questions of fact, as, for example, *status*, or existence, evidence as to which might extend long beyond the five days allowed for the poll in University elections. But if an objection were taken which could be instantly verified, it seems tolerably clear that the officer empowered to hear objections and empowered to put questions is entitled to attend to the instant verification of those objections. The answer to be returned to a question which the officer is entitled to put might be an instant verification of the objection, but it is not the only one. If the objection taken was that the voter was dead or was a minor, a certificate of death or of birth under the hand of the registrar would be evidence admissible anywhere. Similar evidence might be produced if the objection was that the person who desired to vote was an alien. (See the *Middlesex* case, 2 Peckwell's Reports, 118.) Under the Act 6 and 7 Will. IV. c. 11, every alien on arrival must show to the chief officer of customs any passport he has, and declare *inter alia* the country to which he belongs; and the chief officer registers the declaration. A certificate of the declaration under the hand of the chief officer of customs would surely be evidence of the fact of alienage. A certificate of a declaration of alienage under the Naturalization Act of 1870 (33 Vict. c. 14) by the Secretary of State, or by any person authorized by a Secretary of State, which is evidence in any legal proceeding, would surely be evidence on which the Pro-Vice-Chancellor was entitled to act, being an instant verification of the objection. If an objection were taken that the voting paper was not signed in the United Kingdom or the Channel Islands, we think the Pro-Vice-Chancellor would be entitled to take cognizance of it, and to put questions with reference to it. If the person tendering the voting paper said he did not know where it was signed, there would probably be no means of verifying the objection, but that is a matter of detail. Even if no objection were taken, the Pro-Vice-Chancellor would be entitled at his own hand to put questions on the subject, and if the result of his inquiry was that the paper was not signed within the territorial limits mentioned, the Pro-Vice-Chancellor would be entitled to reject the voting paper as not attested in terms of the Act. We by no means say that it is the duty of the officer taking the poll to ferret out objections; indeed a keen nose for invalidity is a possession as undesirable for the comfort of the officer himself as it is for the comfort of other people acting at the poll. At one of the University elections an arrangement was come to between the agents of the candidates, and an agreement was made by which certain classes of votes were to be received without objection. What is the duty of the Pro-Vice-Chancellor in regard to such an agreement? Simply to ignore it.

One question with regard to University elections has, we understand, been raised which has led to much dubiety. If, after a vote has been recorded, it is admitted by those tendering it that it ought not to have been recorded, can it be struck off or returned by the Pro-Vice-Chancellor or the returning officer? Of course not. Once recorded, neither of these officials has any power over it. Such a vote can only be struck off on a scrutiny. It has been urged that there are no means of obtaining a scrutiny in University elections, because there is no provision on the subject in the Act 31 and 32 Vict. c. 48, creating the Scottish University constituencies. The Act of Parliament in question is hardly the place to look for any provision of this kind; and supposing there was no provision in any Act of Parliament, there would still be some means of trying the validity of a University election or any other election. However, we are not left in doubt about the matter. The Parliamentary Elections Act, 1868 (31 and 32 Vict. c. 125), which transferred the jurisdiction in cases of disputed election from committees of the House of Commons, says (secs. 5, 58) that a petition complaining of an undue return or undue election of a member to serve in Parliament for a county or borough may be presented to the Court of Common Pleas at Westminster, if such county or borough is situate in England, or to the Court of Session if such county or borough is situate in Scotland; and in the interpretation clause (sec. 3) it is said that “‘borough’ shall mean any borough, *university*, city, place, or combination of places, not being a county as hereinbefore defined, returning a member or members to serve in Parliament.”

The provisions for making up the register are not satisfactory. By the enfranchising clause of the Act of 1868 (sec. 27), “every person whose name is for the time being on the register . . . of the General Council . . . shall, if of full age and not subject to any legal incapacity, be entitled to vote in the election of a member of Parliament for” the University. Consequently a person not on the register is not entitled to vote. Several persons at a recent University election applied to vote, and there was no doubt that their names ought to have been on the register. Their names, on the erroneous supposition that they were dead, had been struck off, and consequently their votes were refused. In ordinary elections the Assessor makes up a list of persons on the register who have died or become disqualified, and a list of persons who have become entitled to vote. These lists are published in manner provided by the County Voters Act and the Burgh Voters Act. But in Universities the register is made up in a quite secret manner. No publication of names struck off or inserted is made. Each year, before authentication by the Vice-Chancellor, the register, made up by the Registrar and revised by him with the assistance of two Assistant Registrars, may be consulted, and objections may be taken to the improper insertion or deletion of

the names. But who ever thinks of consulting the register? In a constituency so widely scattered as a University constituency is, it can never be so easy a task to certiorate the electors of the alterations proposed to be made as it is in an ordinary constituency. But some means ought to be employed of apprizing electors that their names are proposed to be struck off; and some means ought to be employed of informing the electors of what persons are proposed to be put upon the roll.

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## THE ANIMAL KINGDOM IN COURT.

(From the "*Albany Law Journal*.")

It is so long since we have had anything to say on the legal rights and wrongs of animals and their owners, that we are beginning to experience an uneasy feeling lest Mr. Bergh might soon be on our track. To avert this catastrophe, and to keep in countenance Mr. Rogers of Canada, who not long ago discoursed to us of dogs (see 20 A. L. J. 6), we give the results of our recent gleanings in the law reports on this subject.

In *Mayor of Washington City v. Meigs* (1 M'Arthur, 53; S. C., 29 Am. Rep. 578) it is held that the law recognises property in dogs, and a city ordinance requiring the owner of such property to obtain a licence for keeping the same, and subjecting him to arrest, fine, and imprisonment for not procuring such licence, is invalid. The Court say, "This is too well settled in England and in the States of this Union to be now questioned." The same doctrine is held in *Harrington v. Miles*, 11 Kans. 480; S. C., 15 Am. Rep. 355, and the cases are gathered in a note at page 356. But of this more anon. Our chief interest in the principal case arises from a touching story introduced and told as follows by the learned and humane judge:—

"Not only has the dog been the subject of discussion in the courts, as involving the question of property, but his virtues have been celebrated in song. The wrongs done have been touchingly described by poets, and hours have been occupied at the camp-fires of hunters in narrating the achievements of favourite hounds. History informs us of noble acts of fidelity and affection performed by some sentinel of the class under consideration. Our attention has been called by our brother, Olin, to the event of so much interest to the world, and to the cause of freedom of opinion, and to the exercise of a conscientious faith, the rescue from the grasp of the enemies of toleration of William of Orange, on the morning of the 12th of September 1572, by the action of a little dog. The Spanish army, under the command of Alva, invading the Netherlands, and the army of patriots under the command of the prince, were encamped near the city of Mons. The plan was formed for



the surprise of the patriots and the capture or assassination of William, and for this purpose a band of six hundred *disguised* men were placed under the command of Julian Romero. The historian of the Rise of the Dutch Republic narrates that near the hour of two o'clock in the morning, 'the boldest, led by Julian in person, made at once for the prince's tent. His guards and himself were in profound sleep, but a small spaniel, who always passed the night upon his bed, was a more faithful sentinel. The creature sprang forward, barking furiously at the sound of hostile footsteps, and scratching his master's face with his paws. There was but just time for the prince to mount a horse which was ready saddled and to effect his escape through the darkness before his enemies sprang into the tent. His servants were cut down, his master of the horse and two of his secretaries, who gained their saddles a moment later, all lost their lives, and but for the little dog's watchfulness, William of Orange, upon whose shoulders the whole weight of his country's fortunes depended, would have been led within a week to an ignominious death. To his dying day the prince ever afterward kept a spaniel of the same race in his bed-chamber.' This event occurred but a short time after the Paris wedding, and a short time after the St. Bartholomew tragedy. The historian and moral philosopher can more appropriately discuss the influence which the watchfulness of the little spaniel had upon the destinies of the world. We can only state a reason for the law throwing around this animal its sanction that the right of property exists thereto, and that the right of property existing, it will be sure to receive the protection of man."

Now it seems a pity to disturb the pleasant idea that dogs are universally recognised as property, as above declared and justified. But contemporaneously down in Texas, where it would seem that dogs ought to be more thought of than in the District of Columbia, the Courts hold just the reverse. It is there held that dogs are not property within the constitutional provision for taxation; but a statute exempting one dog to each family, and taxing all others at a fixed rate, under a penalty of non-payment, is valid as a police regulation. The preamble of the statute in question is worth quoting: "Whereas there are in many localities in this State a very large number of dogs, and there are strong indications of a prevalence of hydrophobia, from which much danger will result to the lives and property of citizens," etc. Now two questions arise just here: first, will taxing dogs prevent their going mad? and second, how do mad dogs endanger property? But on the merits the Court quote as follows from *Blair v. Forehand* (100 Mass. 36; S. C., 1 Am. Rep. 94):—

"In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been

thoroughly tamed and are used for burden, or for husbandry, or for food—such as horses, cattle, and sheep—are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures and distinctive instincts, and are kept either for uses which depend on retaining or calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and therefore although man may have such right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have ‘no absolute or valuable property’ therein which could be subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the land of other persons as he would be for the trespasses of his cattle (Vin. Abr., Trespass, Z, Replevin, A; 2 Bl. Com. 93; 3 id. 7; 4 id. 234, 235; *Millen v. Fandrye*, Poph. 161; *Mason v. Keeling*, 1 Ld. Payne, 608; S. C., 12 Mod. 335; *Read v. Edwards*, 17 C. B. (N. S.) 245; *Regina v. Robinson*, 8 Cox’s C. C. 115). And dogs have always been held by the American Courts to be entitled to less legal regard and protection than more harmless and useful domestic animals (*Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121).” And the Court also quote from *State v. Marshall* (13 Tex. 58) as follows:—

“By the common law, though a man may have such a property in these animals as to entitle him to maintain a civil action for an injury done them, yet as they are not classed among valuable domestic animals, as horses and other beasts of burden, nor among animals *domitiæ naturæ*, which serve for food, as neat cattle, swine, poultry, and the like, the property in them is considered of so base a nature, and they are held in so little estimation as property, that the stealing of them does not amount to larceny.”

Supporting the latter view are *State v. Lymus*, 26 Ohio St. 400; S. C., 20 Am. Rep. 772, and *Ward v. State*, 48 Ala. 161; S. C., 17 Am. Rep. 31. Also *State v. Holder*, 81 N. C. 527.

Now let us turn from dogs to bulls. In Iowa they have a statute prohibiting bulls from running at large, and making their owners responsible for all the injury they may thus do. *Crawford v. Williams* (48 Iowa, 247) was an action of damages for seduction by a bull. The plaintiff alleged that he was a breeder of reputed fine thoroughbred stock of the kind known as shorthorns, and that an ill-bred, unregistered, and unpedigreed bull, belonging to defendant, unlawfully at large in the highway, served and got with calf plaintiff’s two-year-old heifer, called “Royal Butterfly,” which is reputed to be registered in “American Herd-Book,” vol. xiii. p. 926, to the damage of plaintiff in the sum of five hundred dollars. The plaintiff testified that he was accompanying a procession of

her royal highness, and six ladies of her court, along the highway, when they met the defendant's cattle, and to use his own graphic and indignant language, "I supposed they were just cows, till I got among them, and the first thing that I knew there was a bull served one of my heifers." A man cannot be too careful about the associates of the females of his family. One unlearned in the law might suppose that this plaintiff was nonsuited on the ground of contributory negligence on his part, or on the part of her royal highness; or that the Court would have held that as the noble and aristocratic lady of the herd thus chose to suffer the embraces of a goodly male representative of her sex, although low-born and presuming too much on short acquaintance, that was a matter entirely within the volition of her highness. Royal personages are not to be restricted by the usages which pertain to the peasantry. It seems to us a touching instance of love at first sight and queenly condescension. Indeed the Court below ruled that the measure of damages in this case was the physical injuries or damages that might have been done to the cow herself, by reason of the attack made upon her by the bull, and confined to that particular time. But the Court on review said:—

"This damage cannot properly be restricted to the merely physical injuries which they occasion. The importance to the State of improvement in all kinds of stock can scarcely be overestimated. The intelligent public spirit which employs itself in the improvement of stock ought to be encouraged and protected. It will be found impossible to maintain good breeds of stock if the owners of 'scrub' male animals may permit them to run at large with impunity. Much skill and intelligence are requisite upon the part of stock-breeders in selecting the most desirable crosses, so as to transmit the best qualities to the progeny. Each stock-breeder has the right to make this selection for himself. If he is deprived of the right of making this selection he ought to be fully compensated for the injury inflicted. The value of thoroughbred stock consists in the probability that the qualities of excellence will be transmitted to the offspring. It is evident that, to a breeder of fine stock, a thoroughbred heifer, with calf to a bull of impure blood, would be of less value than one with calf to a thoroughbred, or not with calf at all. The difference in value of the heifer, for the purpose of breeding fine stock, before meeting defendant's bull and afterward, constitutes the proper measure of plaintiff's damages."

We do not know whether the animal thus stigmatized as a "scrub" is in the habit of reading the Iowa reports, but if he is, we should advise the judge who uttered the above Bourbon sentiments to keep himself out of the defendant's stockyard. The bull, however, may congratulate himself on not residing in Kentucky, where the statutes are peculiarly harsh towards such animals running at large.

## Review.

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*Principles of the English Law of Contract.* By Sir WILLIAM R. ANSON, Bart., M.A., B.C.L. of the Inner Temple, Barrister-at-Law; Vinerian Reader of English Law; Fellow of All Souls College, Oxford. Macmillan & Co. 1879.

THIS book on the Law of Contract gives in a condensed form the principles of English law relating to this branch of the law. Although intended primarily for English students, it contains much information that will be of use to students of Scottish law, who will find that a knowledge even of the technical rules, which are found in this, as in other departments of English law, is of advantage in the study of the simpler and less elaborated system of their own country. In the law of contract there is of course much which is common to the two systems, but without some acquaintance with the formal and technical differences, Scottish lawyers are apt to find English authorities both confusing and misleading. Sir William Anson states clearly the different points to which the student ought successively to direct his attention, but occasionally he seems to divide his subject unnecessarily and without very apparent advantage. Thus he states the elements of a contract to be—(1) proposal and acceptance; (2) form and consideration; (3) the capacity of the parties; (4) the genuineness of the consent; (5) legality of its objects. The first and the fourth of these ought not to be stated as distinct elements, but ought to be placed under one heading, viz. Consent. Consent results from proposal and acceptance, but it is incorrect to speak as if there could be proposal and acceptance producing consent, and yet no contract because the consent was not genuine. If the consent resulting from proposal and acceptance be genuine, and the other three requisites concur, there is a contract. If the proposal and acceptance are objectionable, the first element does not exist. If they are not objectionable, it can never be necessary to inquire whether the consent which springs from them is genuine, because that is already taken for granted. Such unnecessary division will not, however, interfere with the utility of the book as a text-book. The author curiously uses the expression *jus in rem* to express a right of property. The proper expression is *jus in re*. There may be a remedy *in rem*, as in many Admiralty processes, or there may be a *jus ad rem*, where one has a personal claim against some one else to deliver an article to him, but there cannot be a right *in rem* in a man's own possessions. The illustrations from decided cases seem well chosen, and, what is of great importance in a book designed for students, not too numerous.

## Obituary.

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DAVID S. SHIRESS, Esq.—We regret to announce the death of Mr. David S. Shiress, one of the clerks in the First Division of the Court of Session, which took place at Brechin on the 26th ult. Mr. Shiress served an apprenticeship in the country as a writer, and afterwards, coming to Edinburgh, entered the office of Messrs. Clason & Clark, S.S.C. About the year 1850 he became clerk to Mr. Penny, advocate (afterwards Lord Kinloch), with whom he continued at the bar and on the bench till his Lordship's death. He afterwards became private clerk to the late Lord Gordon, both in Edinburgh and London, and in the autumn of 1879 was appointed one of the clerks of the First Division of the Court. For some time Mr. Shiress has suffered from heart disease, and a few weeks ago, feeling rather worse, he went to Brechin, his native place, to try a change of air. Deceased, who was highly respected by a large circle of friends, was over fifty years of age, and leaves a widow and family.

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## The Month.

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*The "Situation" in the Parliament House.*—It must be a matter of thankfulness, we should think, to most of our readers that the *Journal of Jurisprudence* has no politics. We have always endeavoured to distribute praise and blame equally and fairly, no matter what party happened to be in power. It is now our duty simply to chronicle some of the changes which an outgoing Ministry always makes in regard to offices held by the legal profession. It may, however, be allowed us to remark, in the first place, that the Scottish Bar has been singularly unfortunate as regards the number of its members who have been returned to Parliament; in fact there is no disguising the fact that there is intense jealousy of the Parliament House felt all over Scotland; the reason for this is somewhat difficult to see, the Parliament House being still the chief and almost the only centre of learning and cultivation in Scotland. Even considering the different sizes of the respective countries, it must be confessed that the legal profession in this country make a very poor appearance in the Parliamentary returns as compared with either England or Ireland. In the former country no less than ninety-nine barristers have secured seats, and in the latter twenty-three. Eleven solicitors have been returned in England and seven in Ireland. In Scotland the legal profession is represented by two members of the Bar, Sir David Wedderburn and Mr. John M'Laren; and two solicitors, Messrs. Webster and



Macintosh. Four advocates contested seats unsuccessfully. We now come to the changes which the change of Administration will make as regards the Parliament House. After three years' interval the vacant judgeship is at length to be filled up in the person of Mr. ROBERT LEE, Advocate (1853). That learned gentleman's present position as Sheriff of Perth is to be filled by Mr. J. H. A. MACDONALD (1859), late Solicitor-General. Mr. ROGER MONTGOMERIE (1852), late M.P. for North Ayrshire and an Advocate-Depute, takes the dignified and congenial post of the combined offices of Depute-Clerk Register and Register-General. Another Advocate-Depute, Mr. JAMES MUIRHEAD (1857), Professor of Civil Law in the University of Edinburgh, has been appointed Sheriff of Chancery, in succession to Mr. M'Laren, who resigned the office previous to his being elected for the Wigtown Burghs. There has been a "re-shuffling of the pack" as regards certain of the Sheriffs-Substitute. Mr. BEATSON BELL resigns his post at Cupar, having been appointed a Prisons-Commissioner under the Act of 1877, and Mr. LAMOND, the present Sheriff-Substitute at Dunfermline, takes his place. Mr. DAVID GILLESPIE, Advocate (1868), succeeds Mr. Lamond at Dunfermline. By the death of Sheriff Galbraith of Glasgow a vacancy has been created among the Sheriffs-Substitute of that town, which is to be filled up by Mr. BALFOUR being translated from Airdrie, the last-mentioned place receiving instead the services of Mr. W. LUDOVIC MAIR, Advocate (1854). We may also mention that Mr. TYNDALL BRUCE JOHNSTONE, the present Sheriff-Substitute of Clackmannan, has been appointed to act in addition in the same capacity for the county of Kinross, which has been vacant for some months by the death of Mr. Syme. Returning to the Parliament House, we may mention that the assistant clerkship of Session, vacant by the resignation of Mr. W. H. Bell, has been conferred on Mr. JAMES WEBSTER, the late Lord Advocate's clerk, while Mr. ROBERT B. SHAW has been appointed clerk of the bills and sequestrations in the Bill Chamber, in room of the late Mr. Alexander Mann. Mr. JOHN MOIR, clerk to the Solicitor-General, has succeeded Mr. Shaw as assistant clerk in the same department. The depute-clerkship of the Court of Session, held by the late Mr. Donald Robertson, has been bestowed on Mr. JAMES SOMERVILLE, S.S.C.; and Mr. HORACE SKEETE, solicitor, Perth, has been appointed Circuit Clerk of Justiciary, in room of Mr. W. H. Bell, resigned.

*Work of the Glasgow Debts Recovery Court.*—Sheriff Spens took his seat in the Debts Recovery Court on the 27th ult. for the last time before devolving the duties of his office on Sheriff Balfour, Airdrie. Taking advantage of the occasion, his Lordship made a few remarks. Addressing the members of the bar present, he said: "Gentlemen, I have to announce what is already understood, that Sheriff Balfour comes next Monday to take up this

Debts Recovery Court and the other work I have been discharging in the County Buildings for the last three years. I have thought it might be of some interest to look back upon the work of the Debts Recovery Court for that period. The Court is one acknowledged to be of summary despatch, dealing with a class of cases which may be generally described as trade and other accounts, and it has been my object in all these years to carry out what I believe to be the spirit of the Act. In looking back on the past years I find that the gross number of cases in 1875 was 1230; of these proof was led in 73, and there were advised without proof 320. In 1876 the number of cases was 1312; of these proof was led in 106, and advised without proof 339. In the year 1877, which was practically when I commenced work in this Court, although for the first four months I took Sheriff Murray's work, there were then altogether 1689 cases, of which proof was led in 201, and advised without proof 639. In 1878 the cases went up to 1922; of these proof was led in 198, and 745 were advised without proof. Last year the cases were somewhat less, amounting to 1678, of which proof was led in 182, and there were advised without proof 637. It will thus be seen that the Debts Recovery Court has assumed dimensions of considerable importance in the Glasgow Sheriff Court. I know that very often a contested case in the Debts Recovery Court affords very poor remuneration to the agents for the amount of trouble and skill involved. Still, I think it is a Court growing in public favour generally, from the despatch with which business is able to be conducted. The objection I have mentioned might be met by some amending Act, and I think it a fair thing to say that when a case is appealed, and where it may be sent back by the Sheriff on appeal, and further litigation takes place, and ultimately the same litigant is successful again—I do think there ought to be an increased fee awarded, and I think the Sheriff ought to have the power to say whether or not the increased fee should be payable to the agent who has been successful. At the same time, it may be said that the cases should be looked at *en bloc*, and that while one afforded poor remuneration the others paid better." His Lordship concluded by expressing the great courtesy he had always experienced from the members of the bar. He hoped the kindly feelings would always subsist between them and himself. Mr. Buchanan on behalf of the members of the bar briefly replied. The ordinary business of the Court was then proceeded with.

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# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF LANARKSHIRE.

Sheriffs CLARK AND LEES.

CAMERON v. SMITH'S TRUSTEES.

*Reparation — Disrepair of tenement — Bond and disposition in security — Poinding.*—The pursuer was injured by a slate which fell from the roof of a tenement of which the defenders were disponees under a bond and disposition in security. They were infest on the bond, and had applied to the tenants for their rents, put on a factor, and taken a decree of mails and duties. A creditor of the quarter of the bond had also got a decree of poinding of the ground, which however did not apply to the period when the pursuer was injured. The defenders maintained they were not liable in reparation to the pursuer; and the parties having prepared a joint statement of facts, craved a judgment *primo loco* on the question of liability. The judgment was as follows:—

“The Sheriff-Substitute having considered the cause, Finds in respect of the circumstances stated by the parties in their joint minute of admissions, that the defenders being disponees in security of the subjects mentioned on record, and having in virtue of the powers contained in the disposition to them taken possession of said subjects, were thereafter entitled to apply the rents they received in the necessary repairs upon said subjects, and became liable to answer any claim arising from their neglect to execute such repairs: Therefore, and under reference to the above finding, appoints the case to be put to the roll of next Court with a view to further procedure. J. M. LEES.

“*Note.*—As the parties are agreed on the facts that are to be held as proved I am relieved from the necessity of stating them in detail. The question they raise is one of some importance, and it is only after repeated consideration that I have arrived at the conclusion, that in the state of circumstances set forth in the joint minute of admissions the defenders are responsible to answer to the pursuer's claim.

“The defenders are disponees in security under a bond executed in July 1877 of the subjects mentioned on record. The bond and disposition is conceived in terms of the Titles Act of 1868, and the import of its terms is furnished by the Titles Act of the following year. By section 7 of the latter statute it is provided that ‘the clause of assignation of rents shall be held to import an assignation to the creditor and his representatives *in mobilibus*, or his heirs, as the case may be, and to his assignees to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run, in the fuller form generally in use prior to the thirtieth day of September one thousand eight hundred and forty-seven, including therein a power to the creditor and his foresaids to insure all buildings against loss by fire, and in default in payment, to enter into possession of the lands disposed on security, and uplift the rents thereof, or to uplift the rents thereof if the lands are not disposed in security, and to make all necessary repairs on the buildings subject to accounting to the debtor for any balance of rents actually recovered beyond what is necessary for payment to such creditor and his foresaids of the sums, principal, interest, and penalty, due to him or them under such security, and of all expenses incurred by him or them in reference to such possession, including the expenses of management, insurance, and repairs.’

“In this way, as the defenders' debtors and authors made default in payment of the interest due under the bond, the defenders became possessed of the rights conferred on them by the words of the statute I have quoted in respect of such default. Now I apprehend that the source of their respon-

sibility is the taking possession of the subjects. The mere fact that there was vested in their person a right to take possession of the subjects, would not, it appears to me, of itself create against them such an obligation as that which the pursuer seeks to enforce. But the state of circumstances was, that having taken infeftment in July 1877 on their bond, they in May 1879 took those steps which clothed their right with possession. I do not look upon their applying for and obtaining a decree of mails and duties as a factor essential to the existence of such position, though it is a matter not to be left out of view in construing their acts. The default of their debtors to make payment gave them (the defenders) a right to possess, gave them a right to apply to the tenants for payment of their rents, and gave them a right to apply for a decree of mails and duties in order to enforce such payment if the tenants refused or feared to make it when demanded. Now if the defenders had as matter of fact entered upon the actual enjoyment of the subjects, I do not see what answer they could make to the claim of responsibility preferred against them by the pursuer. Their position would be like that of a reverser under a proper wadset. But where subjects are of such a nature that enjoyment of them cannot be actual but only constructive, what the law looks to is whether the acts that they did amount in fact, as in law, to taking possession of the subjects. Now I do not see what the defenders could have done more than they actually did do in order to take possession. The subjects were in the occupation of tenants. All therefore that the defenders could do was to interpose themselves, and assume for themselves towards the tenants the position of landlords and proprietors. With the assumption of that position there arose the relative obligations. They bear the public burdens and they become bound to keep the subjects belonging to them in such a condition that the lieges shall not be injured through failure to execute needful repairs. I understand parties to be at one in holding that there was here failure on the part of some one to have the slating put in a proper state of repair, and the fact that immediately after the accident to the pursuer the slates were overhauled favours this view. But I understand them to differ as to whether the omission to execute such repairs infers any legal responsibility on the part of the defenders.

“Now the defenders urge in addition to the general principle with which I have already dealt that, even if they were entitled to repair the buildings, they were not bound to do so, or at any rate not till they were *lucrati* by their possession of the subjects. I am unable to acquiesce in this view. The Legislature have declared that a bondholder and disponee in security is entitled after the date of the statute (even if he were not so before it) to execute what repairs are needed on the subjects of which he has taken possession. No doubt the primary object of the statute was to enable creditors to take such a step for their own benefit, that is, in order to keep up the subject of the security which was to yield them the fruits that came in lieu of the interest in the bond. Now it is a well-known canon of construction that in some cases the conferring of a right to do a certain act imposes the duty to do it. And I am clearly of opinion that whatever be the duty as to the subjects thereby created in regard to the debtor under the bond, there certainly is created in regard to the public a duty on the part of the creditors in possession to execute all competent repairs which may be needed for the safety of the lieges. Still less am I able to indorse the contention that the defenders possess any immunity till they, as the bondholders in possession, are *lucrati* by their possession of the subjects. To the outside public it is a matter of indifference whether or not the possession of the subjects has proved beneficial to the defenders. That is the defenders' own lookout; all that the public say is, No matter who is possessor, we are entitled to be kept safe.

“But the defenders further urge that if they were bound to execute repairs they were entitled to a reasonable time to do so. I can conceive a question of some difficulty arising under such a plea. But here there is, it seems to me, no room for it. The defenders took steps to acquire possession in May, and they had several weeks therefore to execute what repairs are needed.

"In the last place, the defenders contend that they were prevented by the decree of poinding from dealing with the subjects. I am unable to sustain this plea. Poinding of the ground is of course in some measure a declaratory real action ; but in its purport and effect it is merely a diligence, and all that it affects is the moveables embraced in the decree. It does not affect the subjects on which the moveables are found, nor does it confer on the pursuer of the poinding any title to the subjects themselves. Now the moveables, so far as rents, affected by this decree do not include the rents for the period when the pursuer was injured. In no way therefore can the poinding have any bearing on the question at issue.

"I am therefore of opinion, on the joint statement of facts set forth for the parties, that the defenders are under the same responsibilities to answer the pursuer's claim that ordinary proprietors would be, and that the mere fact of their possessing under a bond and disposition in security does not screen them from whatever liability would exist against a proprietor at common law.

"J. M. L."

On appeal the Sheriff adhered, and the parties having come to terms as to the amount of damages to be paid, the case came to an end.

*Act.*—Kidd Smith.—*Alt.*—Robertson & Ross.

## SHERIFF COURT OF LANARKSHIRE.

Sheriffs CLARK and LEES.

RENDLE v. P. & W. MACLELLAN.

*Contract and sub-contract conditions.*—The defenders, who were contractors for the erection of certain parts of a railway station, sub-contracted with the pursuer to execute one of these parts. The sub-contract referred to the contract, but did not incorporate it. In these circumstances the defenders maintained that as they were bound to uphold all the parts embraced in their contract for a year after the completion of the contract, the pursuer was bound to uphold his part to them for a year also. This contention was repelled.

"The Sheriff-Substitute having considered the cause, Finds that the defenders are the contractors for the iron, carpenter, plumber, glazing, and slater work embraced in the contract No. 3/a for the construction of the Central Station of the Caledonian Railway Company, and that the said work was to be executed in terms and under the provisions of the specification of works, No. 13/1 of process: Finds that the pursuer sub-contracted with the defenders to execute the glazing-work of said contract, conform to the letters Nos. 13/8, 13/2, 11/2, 13/3, 13/4, 11/1, and 13/5 of process: Finds that in terms of said sub-contract the sum payable to the pursuer by the defenders was ascertained and fixed on 3rd October last to be £5765, 5s. 6d., to account of which he has received from them the sum of £5000, leaving a balance due to him of £765, 5s. 6d.: Finds that by the 46th clause of the above-mentioned specification of works, No. 13/1 of process, the defenders are taken bound to keep and maintain in manner there set forth the whole works executed under their contract for a period of one year from the time when the whole works undertaken by them have been completed, and that by section 48 the company are to be entitled to retain as against the defenders such sum as the company's engineer shall fix as reasonable security for the maintenance of the works as aforesaid: Finds that these stipulations are not expressly made to apply to the pursuer under his sub-contract with the defenders, and that on a just and sound construction of the said sub-contract these stipulations are not made so to apply to him by implication: Therefore repels the defences so far as inconsistent herewith; and decerns against the defenders for payment to the pursuer of the sum of £765, 5s. 6d., with the legal interest thereon from the date hereof till payment: Finds the pursuer entitled to expenses, but that only since the closing of the record: Allows, etc.

J. M. LEES."



*Note.*—The only point remaining to be settled between the parties to this case is whether the stipulations as to maintenance of the works apply to the sub-contractors as well as to the contractors. The sub-contract entered into by the pursuer will be found contained in the documents mentioned in the foregoing interlocutor ; but the vital document is the letter from the defenders to the pursuer's Glasgow representative on 23rd September 1878. In it they say, ' We have now much pleasure in accepting your offer of 17th January last, to furnish, deliver, and fit up " Rendle's " patent glazing in above roof at 1s. per superficial foot, in accordance with the specification and drawings, and including patent metallic bars, etc., all subject to the satisfaction of Messrs. Blyth & Cunninghame or their inspector.' It is thus provided that the glazing-work was to be furnished, delivered, and fitted up ' in accordance with specification,' i.e. in accordance with the specification No. 13/1 of process between the defenders and the railway company. The pursuer contends that the import and effect of the words referring to the specification is only to bind him to execute the work in terms of the specification, while the defenders maintain that these words subject him to the same obligations and stipulations as those imposed by the specification on them, and that thus the pursuer is bound to maintain his work for twelve months.

" I am of opinion that the defenders' contention is not well founded. Each side has adduced witnesses whose opinions, owing to their position and experience as men of business, deserve much weight, to speak in regard to what is asserted to be the custom of trade in the matter. While I am disposed to give all proper consideration to their opinions where these clearly point to the affirmation or negation of such an alleged custom, I feel bound to say, even if this had been the case here (which it is not), that I entertain considerable doubt whether the case would not be more justly dealt with on a consideration of its own circumstances. And I would refer to the recent authoritative case of *Towill & Company v. The British Agricultural Association* (3 R. 117) as showing that it is the duty of a court of law to be chary in admitting extrinsic evidence to aid it in construing a mercantile contract. It seems to me accordingly that this case must be disposed of on a consideration of its own circumstances, and I doubt if it can be said to yield any general rule applicable to the relation of contractors and sub-contractors.

" I do not see that the stipulations as to maintenance are necessarily imported by implication into the sub-contract to make it workable ; it will work well enough without them. All that can be said is that in fairness to the contractors they should have for their own safety the same protection against bad workmanship on the sub-contractors' part that the railway company have for that purpose against them. This is an argument, however, of equity, not of legal necessity. It is an argument that I could understand being maintained, although I do not think it could be sustained. But it is not the defenders' argument ; what they contend is that the sub-contractor just steps into the contractor's shoes, and they say that they are handing him over every penny they are getting from the railway company. It may be that they are doing so ; the pursuer could not compel them to do so. But if the sub-contractor steps into the contractor's shoes and subjects himself to all the obligations they undertook, then the sub-contractor will be bound to maintain his work for the whole period the contractors undertook to maintain theirs. Now if the principle is sound it must apply to all the sub-contractors, to the man who executed the first sub-contract as well as to the man who executed the last. But the defenders urge a different principle, for what they maintain is not that each sub-contractor shall implement as to maintenance the condition stipulated for in their contract with the railway company, but that each shall have a period of maintenance applicable to himself, no two ending at the same time. I fail to find in the contract any justification for this contention.

" Again, if the clause as to maintenance is binding on the sub-contractors, so I apprehend is the clause as to security for due implement of the undertaking ;

and it seems to me too far-fetched to say it would be applicable. But further, take it that the contract between the railway company and the defenders had stipulated, as is not uncommon in contracts, how and when payment was to be made, could it be said that the stipulations on these points would be binding on the sub-contractors—that if the contractor agreed to take payment in bills from his principal so must they from him—that if the contractor agreed to lie out of his money for a year so must they? I do not say there would be anything unfair in making such stipulations any more than in making the one the defenders say was by implication made here; but I think that to be binding they would require to be expressly made. As a general principle I apprehend that where one contract refers to another, but does not expressly incorporate its provisions, only those are incorporated by such reference which are essential to make the former workable. J. M. L.”

The defenders appealed to the Sheriff, but he adhered on the grounds stated by the Sheriff-Substitute.

*Act.*—Mitchells, Cowan, & Johnston.—*Alt.*—Robertson & Ross.

## SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

### WEST OF SCOTLAND HYDROPATHIC CO.

*Lockhart—Guarantee—Terminus a quo.*—The defender having granted to the pursuers a guarantee of the intromissions “till Whitsunday” of a person who had been their secretary, but who, without the defender being aware of it, had ceased to be their secretary, the question arose, From what date did the guarantee have effect? The Sheriff-Substitute (Lees) held it applied only to the future intromissions. The following were the findings:—

“Finds that the pursuers, having discovered early in the present year that there was a deficiency in the funds held by their secretary, Robert Yorston, writer, Glasgow, pressed him to try and get security for the deficiency, holding out the prospect to him that if security to a certain extent was got they would not take action against him: Finds that Yorston obtained various securities and *inter alia* obtained from the defender a letter of guarantee in the following terms, ‘Pollokshaws, 5th March 1879.—I will be responsible for Mr. Yorston’s intromissions with the West of Scotland Hydropathic Company for £150 till Whitsunday of this year.—David Lockhart.’ Finds on a just and sound construction of the terms of this document, having in view the communications made to the defender and whole circumstances of the parties, that they do not cover or apply to the intromissions of Yorston prior to the date of the said document, but only to those subsequent thereto: Finds that there were no intromissions had by him with the funds of the pursuers subsequent thereto, he having ceased to be their secretary on 27th February: Finds in these circumstances that the defender is not liable under said guarantee in payment of any sum to the pursuers; therefore assoilzies him from the conclusion of the action, and decerns: Finds him entitled to expenses, etc. J. M. LEES.

“*Note.*—This is a question of some delicacy, and unfortunately neither I nor the agents of the parties have been able to find any decision in the Scottish or English Courts bearing on the point. If it can be said that the terms of the document are clear they must be construed without external aid; the document must speak for itself. But its terms are not clear. The difficulty is caused by the qualifying words ‘till Whitsunday.’ Read without these words the natural meaning of the obligation, as applicable to the intromissions of a man already in office, would probably be that the granter of the obligation undertook liability to the extent of £150 for the intromissions, no matter when they had taken place. But the adjection of the words ‘till Whitsunday’ may mean either that the defender undertook liability for all Yorston’s intromissions past

and future up till Whitsunday, or else that the defender undertook a liability which was to cease on Whitsunday, or that it was for the intromissions to occur between the date of the document and Whitsunday. The second construction cannot, I think, reasonably be upheld: it is somewhat inconsistent with the object and scope of a guarantee, and the correct construction must be found in the first or third. If the matter could be settled by ascertaining what in the position of affairs or in the intentions of the pursuers was the purpose of the guarantee, the matter would not be difficult of decision. What the pursuers needed and what they wished was a guarantee for the existing deficit in their secretary's accounts. But at the date when the document in question was granted as he had ceased to be their secretary, there could be no further intromissions had by him, and therefore the document, if applicable only to future intromissions, would have been worthless to them. Still, though these circumstances are not to be laid wholly out of view, what one must chiefly look to in ascertaining *quo animo* a deed is granted if the deed itself does not sufficiently show, is, What was the intention of the granter? Now here I am satisfied that the defender did not know that Yorston had ceased to be secretary; and he swears in the most positive manner that when Yorston asked him to become responsible for part of the existing deficit he point blank refused to do so, and that he only agreed to become security for the intromissions of Yorston between the date of the document and Whitsunday in order that the latter might not lose his situation. This is in no way inconsistent with anything that passed. I have therefore come to the opinion, though not without much hesitation, that the defender is entitled to succeed.

J. M. L."

The judgment was acquiesced in.

*Act.*—Robertson & Ross.—*Alt.*—Murdoch & Stewart.

## SHERIFF COURT OF LANARKSHIRE.

Sheriffs CLARK and LEES.

LANDLESS v. WILSON.

*Professional services—Use of plans.*—In this action the pursuer, who is an architect, sued for payment of various sums. The defence in regard to certain plans prepared by the pursuer was that these were only to be paid for if used for building purposes, and that they had not been used for this purpose. The facts appear from the part quoted of the following interlocutor and note:—

"The Sheriff-Substitute having considered the cause, Finds as regards item No. 4—(1) That the pursuer on the employment of the defender prepared the plans embraced in No. 9/6 of process, with the reports relative thereto, Nos. 9/7, 9/8, and 9/9, and the sketches Nos. 9/2 and 9/3, to enable the defender to carry out the project which he stated to the pursuer he entertained of building on the ground belonging to him specified in said plans; (2) that the pursuer gave these professional services on the express footing that the defender intended to build on said ground, and that if his plans were adopted he would be paid in usual form; (3) that the defender having obtained possession of said plans and other documents, instead of using them on the footing on which they had been prepared, submitted them to a purchaser, and in a considerable measure in consequence of the inducements offered by the plans succeeded in selling the property at a large profit; and (4) that the pursuer is in these circumstances entitled to claim payment from the defender for his professional services: Therefore, etc.

J. M. LEES.

"*Note.*—The only item in regard to which I think it necessary to make any remarks is item No. 4, for which the pursuer claims £87. It is not denied that the pursuer did the work for which he asks to be paid; but the defender says he gave his services on the express footing that he was to be paid only if his plans were used for the defender's projected buildings, and that another

architect gave his services on the same footing. Competitive plans would seem not to be usual in regard to private buildings; but if such a bargain was made by the parties, no court has any power to make a different one for them. It appears to me on a consideration of the evidence adduced that the weight of it is in favour of the view contended for by the defender, and I think that even the pursuer's own letter of 22nd November 1877 supports this view. If I could hold that the defender had not established the point he maintains, the pursuer would of course be entitled to be paid for his services in ordinary form. But as I think the defender has succeeded in proving what he alleges on this point, the pursuer cannot claim payment if the bargain made between him and the defender was adhered to. But it was not adhered to, and it is an agreement that ought I think to be construed strictly. The pursuer gave his services on the faith, I must hold, that he was competing for employment by the defender. The latter, however, does not appear to have taken any use of the plans on the footing on which they had been prepared; but at once submitted them to a purchaser, who admits that he was influenced by the skilful manipulation of the ground by the pursuer and resolved to buy the subjects. Now the defender by what he did produced two results. Firstly, he voluntarily and to suit his own purposes defeated the possibility of the pursuer taking any benefit by the work he had done; and the instructive case of *Pirie v. Pirie* (10th December 1872, 45 J. 134) shows the effect this may have on the rights of parties where it is done *mala fide*. But as I do not think anything amounting to *mala fides* is shown here, I proceed to the next point. In the second place, the defender took the beneficial use of the pursuer's services for a purpose for which there had been no agreement that they should be given gratis. The state of circumstances that supervened was then taken out of the arrangement made by the parties; and the pursuer is in consequence entitled in my opinion to be paid for his services on the *quantum meruit* principle. I see no reason why he should not get the full and usual remuneration, whatever that may be. The defender bought the subjects at £12,500, and sold them in three months for £16,700. Out of this profit he could afford to pay the pursuer. As parties agreed to take a judgment on the question of liability, leaving the matter of amount, if any, to be settled by remit, no evidence was led as to the scale of payment; and I have remitted the account to the person who seems to me the proper one in the circumstances to deal with it. J. M. L."

On appeal the Sheriff adhered.

Act.—Downie & Aitken.—Alt.—Buchan.

## Notes of English, American, and Colonial Cases.

**NUISANCE.**—*Public Health Act*—*Pollution of stream*—*Injunction against local board*—*Mandamus*—*Judicature Act*.—If a sewer when transferred to a local board or other sanitary authority, under the Public Health Act, 1875, was in such a state that, independently of the Act of Parliament, it would give to any landowner a right to an injunction to restrain the use of that sewer so as to be a nuisance, the local board would be in the same position as any other owner of a sewer would be. Distinction between the right to an injunction to restrain a wrongful act and an injunction in the nature of a mandatory injunction. Neglect by a board to perform a public statutory duty does not entitle every individual who may be injured by such neglect to bring an action for damages or a mandatory injunction. The proper remedy where there is such a neglect as to amount to a refusal to take steps, is to apply for a mandamus; and application for such a mandamus, being the prerogative mandamus, should still, notwithstanding the Judicature Act, 1873, section 25, subsection 8, be made

to the Queen's Bench Division. Where a board has itself done acts which, independently of a statutory authority, would be an actionable nuisance at Common Law, a board is liable as any private individual would be to an action for damages or an injunction. The defendants were constituted the sanitary authority, under the Public Health Act, 1875, for a district in November 1875. At that time there was an existing nuisance, with regard to which the plaintiff had frequently, since 1874, complained to the previous sanitary authority, and he continued his complaints to the present defendants. In July 1876, no steps having been taken by the board to abate the nuisance, he brought an action for an injunction to restrain them from permitting sewage to pass through the drains under their control so as to be a nuisance to him:—*Held* (reversing the decision of Malins, V.C.), that, assuming the existence of an actionable nuisance, as it had not been created or increased by the defendants, the plaintiff had no right of action against them.—Observations on *The Attorney-General v. The Mayor of Basingstoke* (45 L. J. Rep. Chanc. 720). *Glossop v. The Heston and Isleworth Local Board*, Chanc. (App.) L. J. Rep. 89.

NUISANCE.—*Practice—Evidence—Dedication to the public—Nature of defence stated in the pleadings—Urinal—Injunction.*—In an action to restrain the defendants from erecting a urinal in Old Burlington Mews, the statement of claim alleged that the soil of the mews was vested in and was the absolute property of three of the plaintiffs. The statement of defence did not admit this allegation; but alleged that the mews had long been a highway dedicated to the public, and belonged to the parish as one of the public streets thereof. At the trial of the action several witnesses were examined on both sides; and, at the close of the defendants' evidence, the plaintiffs applied for leave to call evidence in reply, to show that the soil of the mews had not been dedicated to the public:—*Held*, that, as the plaintiffs were distinctly apprized by the pleadings before the trial of the action what the nature of the defence would be, the application must be refused. The intended erection by a vestry, acting under the powers given by section 88 of 19 and 20 Vict. c. 120, of a urinal in a mews (which, in the opinion of the Court, was a highway within section 96 of the Act) at a distance of eight feet from the back door of the plaintiff A and the cellar entrance of the plaintiff B, and quite close to a narrow passage down which several young females had to pass daily on their way to the showrooms of the plaintiff C:—*Held*, to be such a nuisance as to afford ground for a perpetual injunction. What amounts to a dedication of a street to the public considered.—*Vernon v. The Vestry of St. James, Westminster*, Chanc. L. J. Rep. 130.

PARLIAMENT.—*Borough vote—Notice of objection—Description of objector—Parish—41 and 42 Vict. c. 26, s. 4.*—The parliamentary borough of Liskeard consists, first, of the municipal borough, which is part of the parish of Liskeard; secondly, of so much of the parish of Liskeard as is not within the municipal borough; and thirdly, of the parish of St. Cleer. Each of these places has separate parochial officers and rates, and for the purpose of distinction the first is known as "the borough of Liskeard," and the second is known as "the parish of Liskeard." In a notice of objection to a person on the list of parliamentary voters for the borough, and given under 41 and 42 Vict. c. 26, the objector was described as being "on the list of parliamentary voters for the parish of the borough of Liskeard, Division 1:—*Held*, that such notice of objection was sufficient, as the borough of Liskeard was a parish as defined by section 4 of 41 and 42 Vict. c. 26, and the notice followed the words of the Form (I.) No. 2 in the schedule to such Act.—*Sargent v. Rodd*, 49 L. J. Rep. C. P. 195.

PARLIAMENT.—*Borough vote—Notice of objection—Description of objector—Parliamentary lists—Power to amend notice.*—In a notice of objection to a person on the list of parliamentary voters for a borough, the objector, who was himself on such list, and as such entitled to object, described himself as "on the list of voters for the parish" of W., instead of "on the list of parliamentary



voters for the parish " of W., in accordance with Form (I.) No. 2 in the schedule to the Parliamentary and Municipal Registration Act, 1878, 41 and 42 Vict. c. 26 :—*Held*, that this was a mistake within the meaning of section 28, subsection 2 of that Act, and that the Revising Barrister both could and ought to have corrected such mistake.—*James v. Howarth*, 49 L. J. Rep. C. P. 169.

**PAWNBROKER.**—*Pawnbrokers Act*, 1872, 35 and 36 Vict. c. 93—*Rights of true owner of pledge.*—The Pawnbrokers Act, 1872, which in section 25 provides that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing," governs the rights between pawnbroker and customer only, and the pawnbroker who delivers the pledge to the person producing the pawn-ticket is not indemnified against the true owner, without whose consent the pledge has been made, but the true owner is entitled to enforce his rights at common law by action.—*The Singer Manufacturing Company v. Clark*, 49 L. J. Rep. C. P. 224.

**RAILWAY.**—*Lands Clauses Consolidation Act*, 1845 (8 and 9 Vict. c. 18), s. 127—*Superfluous lands*—"Required for the purposes of the undertaking."—Lands acquired by a company under the provisions of the Lands Clauses Consolidation Act, 1845, and not sold or used for the purposes of the undertaking within the period specified in section 127, are not "superfluous lands" within that section if at the end of that period there is a purpose within the company's Act to answer which the land is retained in good faith by the company.—*Betts v. The Great Eastern Railway Company* (H. L.) Ex. 49 L. J. Rep. 197.

**SHIP AND SHIPPING.**—*General average—Exceptions in bill of lading—Injury to goods by water employed to extinguish fire—Liability of shipowner for not procuring adjustment of general average.*—A bill of lading, by which the shipowner undertook to deliver the goods at a port to a railway company, to be by them carried inland and delivered to the consignees, contained an exception, "that the shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim, notice of which is not given before the removal of the goods." On the voyage a fire broke out, and the cargo was damaged by the admission of water to extinguish the fire. The ship put back, and the shipowners delivered the cargo up, without taking security from any of the cargo owners, or taking any step for procuring an adjustment of general average :—*Held*, first, following *Schmidt v. The Royal Mail Steamship Company* (45 L. J. Rep. Q. B. 646), that the shipowners were not exempted from contribution to general average by the clauses in the bill of lading; and second, that they were liable to an action by a shipper of goods for neglecting to take the necessary steps for procuring an adjustment of the general average, and securing its payment.—*Crookes v. Allen and the Montreal Ocean Steamship Company*, Q. B. 49 L. J. Rep. 201.

**SHIP AND SHIPPING.**—*Charter-party—Conversion of cargo—Breach of contract in not signing bills of lading.*—It was stipulated by a charter-party made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charter-party. In an action by the charterers against the shipowners for conversion and for penalties,—*Held*, that the plaintiffs could recover nominal damages for the breach of contract in not signing bills of lading as presented; but that there

had been no conversion by the defendants of the cargo, as they had carried it for the plaintiffs, had intended to deliver the whole of it to the consignees of the plaintiffs, and had been prevented by the acts of the plaintiffs from completing the delivery.—*Jones v. Hough* (App.) Q. B. 49 L. J. Rep. 211.

WINDING UP.—*Unlimited company—Shareholders—Bankruptcy—Liquidation—Disclaimer.*—In the winding up of a company neither can a shareholder who has become bankrupt or gone into liquidation, nor can the trustee under such bankruptcy or liquidation who has disclaimed in accordance with the 23rd section of the Bankruptcy Act, 1869, before any call has been made in the winding up, be placed upon the list of contributories.—*In re The West of England and South Wales District Bank; ex parte Budden and Roberts*, 48 L. J. Rep. Chanc. 764.

SHIP AND SHIPPING—*Marine insurance—Constructive total loss—Construction of bye-laws incorporated into policy.*—A vessel insured under a policy was so damaged by perils insured against that the cost of repairing her would have been more than she would have been worth when repaired, and the owner gave notice of abandonment without delay. The policy, which was with a mutual company, and had incorporated in it certain bye-laws, declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured, should not be considered as a waiver or acceptance of abandonment. By one of the bye-laws it was provided that in the event of any ship being stranded or damaged, and not taken to a place of safety, the company might use all possible means to procure her safety, the owner bearing his proportion of the expenses incurred; but that no acts of the company in pursuance of such power should be deemed to be an acceptance of any abandonment of which the assured might have given notice; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured. On action brought to recover for a constructive total loss,—*Held*, that the bye-law did not exclude constructive total loss, but only prevented the assured in case of partial loss from being able to claim any extraordinary expense, by way of salvage or otherwise, in addition to the cost of repairs; and that there having been a constructive total loss, the plaintiff was entitled to recover.—*Forwood v. The North Wales Mutual Marine Insurance Co.*, 49 L. J. Rep. Q. B. 243.

SHIP AND SHIPPING—*Cargo on ship's account—Nominal freight—Vendor's lien—Shipper's rights under contract with purchaser of cargo.*—The plaintiff shipped goods in his own vessel to be carried on the ship's account, a nominal freight of one shilling per ton being payable under the bill of lading. He subsequently sold the goods whilst in transit for 65s. per 500 lbs., "including freight and insurance, freight to be reckoned at 60s. per ton." After intermediate sales, the defendants bought the goods whilst still in transit upon the same terms as to freight. The ship arrived at the port of discharge, and the defendants, having notice of the terms of the plaintiff's contract, paid him a sum on account of freight at 60s. per ton, and thereupon obtained delivery of the goods. In an action by the plaintiff to recover the balance alleged to be due for freight,—*Held*, that the 60s. per ton agreed to be treated as freight in the plaintiff's contract for sale was unpaid purchase-money, in respect of which he had a lien on the goods before delivery; that the defendants' conduct under the circumstances amounted to an implied contract to discharge the lien, and therefore that the plaintiff was entitled to recover.—*Swann v. Barber & Co.*, (App.) 49 L. J. Rep. Q. B. 253.

JURISDICTION OF COURT—*English marriage—Foreign husband—Stipulation for an English residence by wife, an Englishwoman.*—An English lady of fortune consented to marry the eldest son and heir of a Neapolitan nobleman on condition of their always having after marriage a residence in England, and of their residing there six months at least in each year. The marriage was celebrated in August 1854 in England. There were five English trustees of

the marriage settlements, which contained a proviso that they should be construed according to the law of England. A few months after the marriage a London residence was taken and furnished by the parties, which they occupied for six months in each year, with two or three exceptions, from 1855 to 1872, living for the remainder of the year in apartments in the palace of the husband's father at Naples, or at other places on the Continent. In 1872 the lady separated from her husband in consequence of his cruelty and of his adultery with an opera singer, and she continued up to the hearing of her petition to reside in their London residence. In 1873 the husband's father died, when he succeeded to his title and estates and palace at Naples, and since then he had resided sometimes at Naples, but principally with the opera singer at other places on the Continent. The petition and citation were served on him at Paris, and he had entered no appearance :—*Held*, that the Court had jurisdiction to dissolve the marriage.—*Santo Teodoro v. Santo Teodoro*, 49 L. J. Rep. P. B. & A. 20.

PARLIAMENT.—*Borough vote—Residence*.—A person on the list of voters for the city of Exeter had not in fact resided within seven miles of that city for six calendar months previous to the 15th of July, but during a small portion of that time he had been in London serving under articles of clerkship to a solicitor there. He had, however, a separate bedroom set apart for his exclusive use in his father's house, which was situate within seven miles of Exeter, where he had continuously resided previously to his going to London to serve under such articles, and where, subject to such articles, he always intended to reside, and where in fact on the expiration of such articles he did so reside :—*Held*, that such person whilst serving in London under such articles had not a sufficient constructive residence within seven miles of Exeter to satisfy the requirements of 2 and 3 Will. IV. c. 45, s. 31.—*Ford v. Drew*, 49 L. J. Rep. C. P. 172.

PARLIAMENT.—*Borough vote—Description of qualification—Declaration by voter—Houses in succession—Power to amend*.—The 41 and 42 Vict. c. 26, does not any more than 6 and 7 Vict. c. 28, empower a revising barrister to substitute a different qualification for that appearing on the list. Therefore where the qualification of a person on the list of borough voters was described in the third column as "house" and in the fourth column as "8 Birley Place," and such person made a declaration according to section 24 of 41 and 42 Vict. c. 26, in which he declared that the correct particulars of his qualification ought to be stated in the third column "houses in succession," and in the fourth column "8 Birley Place and 9 Birley Place," it was held that the revising barrister had no power to amend the list in accordance with such declaration.—*Porrett v. Lord*, 49 L. J. Rep. C. P. 176.

PARLIAMENT.—*Borough vote—Amendment—Lodger franchise—Mistake in claim*.—By section 28 of the Parliamentary and Municipal Registration Act, 1878 (41 and 42 Vict. c. 26), the revising barrister shall, with respect to the lists of voters which he is appointed to revise, perform the duties and have the powers following : (1) "He shall correct any mistake which is proved to him to have been made in any list ;" (2) "he may correct any mistake which is proved to him to have been made in any claim or notice of objection." The appellant claimed for the first time to have his name inserted in the list of voters in respect of a lodger qualification. The claim, which was in the Form H, No. 2, of the Parliamentary and Municipal Registration Act, 1878, was insufficient, inasmuch as the appellant had omitted from the fourth and fifth columns respectively to state the amount of rent he paid and the address of his landlord. The revising barrister refused to amend :—*Held*, that these were mistakes in a "claim" within section 28, sub-section 2, and that the barrister had therefore a discretionary power, and was not bound to amend.—*Pickard v. Baylis*, 49 L. J. Rep. C. P. 182.

# THE JOURNAL OF JURISPRUDENCE.

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## “THE HEATHEN CHINEE.”

JUST as many people have read the “Pilgrim’s Progress” without becoming in the least aware that it was an allegory, so in the same way many, and indeed most, people have read Bret Harte’s famous poem, the “Heathen Chinee,” without having the slightest suspicion that underneath the humour of the thing there lay a keen satire on the antipathy, curiously compounded of aversion and apprehension, which the working class in California have for the Chinese immigrants, whom the easy transit across the “herring-pond” of the Pacific Ocean has enabled to come in shoals to the western shores of America. This feeling of antipathy is not difficult to account for. First of all, we have the contempt which the people of the Anglo-Saxon race, above all people in the world, have for people of other races, and their sense of natural superiority over other races—that insularity of sentiment which the Anglo-Saxons have carried with them from their original island home where the race became a nation to every continent and over every sea, and which has remained current in their veins after the lapse of many generations. Then again, the Chinese do not allow themselves to be absorbed in the nation. They keep aloof, they live apart; their thoughts are not as the Californian thoughts, nor their ways as the Californian ways. They earn their money, they save it, and when they have saved enough they return to the Flowery Land. They only take what good they can out of the soil of their temporary residence, they use the country but care nothing for it, and indeed they have no thought of all that is done beneath the process of the Californian sun. But, more than all, there is the jealousy of their competition in the labour market. They are, in truth, formidable competitors. They work hard and steadily, and as they live frugally and don’t drink, they can afford to work for less wages than the ordinary American or Irish labourer. Besides, the more competitors there are in the labour market the lower the rate of wages, and that is why the purely *ouvrier* class regard competition with an intensity of hatred compared with which their sentiments of hostility to

anything else are feeble indeed. Your proletarian is your true protectionist, and there is no tyranny whose ramifications are, or have the opportunity of being, so widespread as the tyranny of a democracy. This unworthy jealousy of the Chinese has, in California, led to many acts of insult, and even to unjust and oppressive measures of repression and restriction. Attempts have been made to impose a special tax on Chinese for the privilege of mining, and to subject them to peculiar and exceptional punishments by what has been called the Queue Ordinance. These attempts were promptly foiled on appeal to the courts of California, and lately another legislative attempt to oust the Chinese from the labour market has been made by the Californian Legislature, and has in its turn also been frustrated by the Californian Court in the case of *Tiburcio Parrott*, a copy of the judgment in which case has been furnished to us.

In the Constitution of the State of California adopted in 1879 there is this provision made with reference to Chinese:—

ARTICLE XIX. CHINESE.—Sec. 1. The Legislature shall prescribe all necessary regulations for the protection of the State, and the counties, cities, and towns thereof from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the wellbeing or peace of the State, and to impose conditions upon which such persons may reside in the State, and to provide the means and mode of their removal from the State upon failure or refusal to comply with such conditions; provided that nothing contained in this section shall be construed to impair or limit the power of the Legislature to pass such police laws or other regulations as it may deem necessary.

Sec. 2. No corporation now existing, or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The Legislature shall pass such laws as may be necessary to enforce this provision.

Sec. 3. No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.

Sec. 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the wellbeing of this State, and the Legislature shall discourage their immigration by all the means within its power.

This is, according to our English and Scottish notions, a most extraordinary article. It is an attempt to hermetically seal the territory of California so far as Chinese are concerned. The article reads more like a declaration of the polity of a barbarous state, like Japan in the old days, into which the ideas of civilization had not penetrated, than an article in a new constitution framed in the last quarter of the nineteenth century for a community which loudly proclaims its advanced and enlightened ideas, and announces as the fundamental principles of society the freedom and equality of men. "Westward the course of empire takes its way." Something else appears to have taken its way there too, for the present. We hear on both sides of the Atlantic a good deal of wearisome jabber about this being an age of progress, and how superior this age, which has the advantage of being blessed with our presence, is



to all the ages that have preceded; and we are condemned to listen to much tall talk about the march of intellect. In California the march of intellect has been so rapid that it has marched out of sight.

There is no mistake about the object of the provision. It is openly and even ostentatiously avowed. The article forbids the employment of Chinese by any but private individuals. It declares the presence of foreigners ineligible to become citizens, *i.e.* the Chinese, dangerous to the wellbeing of the State of California, and it directs the Legislature to discourage their immigration by all the means in its power; leaving, with a confidence which was not likely to prove misplaced, the methods to be devised for carrying out this purpose to the ingenuity of the Legislature. And as regards Chinese who had already obtained or who might obtain entrance into the State, it plainly indicates that their residence was to be made less comfortable than that of other people; giving the Legislature power to subject aliens who are or *may become* vagrants, etc. (which is comprehensive enough in all conscience), to conditions of residence which in the present temper of the Californian democracy are certain to be odious and harassing, and also power to provide means for their removal from the State. The title of the article shows that it is the Chinese who are the aliens who are or may become vagrants, and who are dangerous or detrimental to the wellbeing or peace of the State.

As yet the Legislature has not attempted to carry out the mandate of the first section by imposing conditions of residence on aliens who are or may become vagrants, etc., or who are otherwise dangerous or detrimental to the wellbeing or peace of the State. But the Legislature has passed an Act to carry out the mandate in the second section of the article. The Act, which was approved of February 13, 1880, is in these terms:—

An Act to amend the Penal Code by adding two new sections thereto, to be known as Sections 178 and 179, prohibiting the employment of Chinese by corporations.

The People of the State of California, represented in Senate and Assembly, do enact as follows:—

Sec. 1. A new section is hereby added to the Penal Code, to be numbered Section 178.

Sec. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing, or hereafter formed under the laws of this State, who shall employ in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanour, and is punishable by a fine of not less than 100 dollars nor more than 1000 dollars, or by imprisonment in the county jail of not less than 50 nor more than 500 days, or by both such fine and imprisonment; provided that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the Board of Directors.

1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:—

2. For each subsequent conviction such person shall be fined not less than 500 dollars nor more than 5000 dollars, or by imprisonment not less than 200 days nor more than two years, or by both such fine and imprisonment.

Sec. 2. A new section is hereby added to the Penal Code, to be known as Section 179, to read as follows :—

Sec. 179. Any corporation now existing, or hereafter to be formed under the laws of this State, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanour, and, upon conviction thereof, shall, for the first offence, be fined not less than 500 dollars nor more than 5000 dollars, and upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise and all its corporate rights and privileges, and it shall be the duty of the Attorney-General to take the necessary steps to enforce such forfeiture.

This Act shall take effect immediately.

The public authorities seem to have lost no time in putting this Act in force. It was, as we have said, approved of on February 13th. The petitioner, Tiburcio Parrott, was arrested and put in prison for violating its terms; it is not stated when, but the case came to a final judgment on the 20th of March.

The case arose in this way. Parrott, the petitioner, was president and director of the Sulphur Bank Quicksilver Mining Company, a corporation organized under the laws of California before the adoption of the new Constitution. Parrott was arrested and held to answer before the State Court upon a complaint setting forth the offence of employing certain Chinese in the business of the corporation in contravention of the provisions of the above Act. He sued out a writ of *habeas corpus*, which having been returned, he asked to be discharged. The grounds of his demand were that the enactment and the article in the Constitution of the State in pursuance of which it was passed were void, being in violation of the supreme law of the United States, to which the laws and constitutions of the particular States composing the Union must bow; in violation, in particular, of the Burlingame Treaty with China, and of the Fourteenth Amendment to the Constitution of the United States made in 1866, and the Civil Rights Act passed to enforce the provisions of that amendment. It was not disputed by the Attorney-General for California that the provisions made in reference to the Chinese, if in violation of the treaty and the amendment, were void. But it was urged that there was this specialty in the case: it was against *corporations* merely that the law was directed, that the article of the Californian Constitution permitting corporations to be formed under general laws reserves power to repeal, alter, or amend those laws at the discretion of the Legislature; that if the Legislature can by repealing those laws put an end to the corporate existence of the corporations, *multo magis* can it impose conditions on which their existence is to be allowed; that this reserved right is practically unlimited and uncontrolled, and may be exercised by prescribing conditions on corporations relative to the conduct of their business and the enjoyment of their property, which would be unconstitutional and void if directed

against private persons, and which would be valid even if the result of their operation were to impair or destroy the beneficial use of the corporation's property, and defeat the purpose and object of its existence; that, in short, corporations are the creatures of the State—it has made them, and under its reserved powers it can mar them. The State might therefore, it was argued, prescribe what persons the corporation is entitled to employ, and determine their number, their nationality, and even their creed. Here again we are presented with a new and startling state of things, an arbitrary power claimed by the State which is unfamiliar to us in this country, where there is hardly any power that is not regulated and fenced in with agencies and influences of control. Chancellor Kent, writing in 1826, says, "It has become quite the practice in all the recent Acts of incorporations for private purposes, for the Legislature to reserve to themselves a power to alter, modify, or repeal the charter at pleasure; and though the validity of the alteration or repeal of a charter in consequence of such a reservation may not be legally questionable, yet it may become a matter of serious consideration in many cases how far the exercise of such a power could be consistent with justice or policy" (Kent's Commentaries, ii. 306). The State of California seems to have improved upon the practice of introducing reserved rights into Acts of incorporation. By an article of its Constitution it has reserved what appears to be, in terms at least, a supreme right in the case of every corporation. It is difficult to draw the line beyond which the exercise of reserved powers becomes illegal; but according to Judge Hoffman, one of the two judges who sat in *Parrott's* case, there is such a line. "It may confidently be affirmed," he observes, "that it was not intended to authorize the exercise of the unrestrained power over the operations of corporations, and the use of their property contended for." Judge Hoffman proceeds to prove this proposition by a review of the leading cases on the subject, and there seem to have been many. (See *Shields v. Ohio*, 95 U. S. 324.) The balance of opinion appears to be that the reserved power could not be exercised to the destruction of the rights or property which have become vested in the corporation under a legitimate exercise of its powers; and in the present case Judge Hoffman held that if so, as little was the Legislature entitled to prescribe rules and conditions which would injure or destroy the beneficial use of the property so acquired. This would happen, he argued, if corporations were subjected to restrictions as to the class of labourers they might employ. They would be placed at a ruinous disadvantage if they were forced to draw their supplies of labour from a much more limited area than private individuals did. If the Legislature were entitled to determine the class of labourers, they might also determine the hours of labour, the rate of wages, and surround the action of corporations with a thousand vexatious and pernicious restrictions. This reasoning is ingenious

enough in its way, but it is hardly necessary for the decision. We do not propose to follow the learned judge over this somewhat delicate and debatable ground, and ground which it is not necessary to enter upon at all. The limitation of the reserved power of the State and the Legislature over corporations is to be found not in the rights of the corporate bodies, but in the power of the supreme law of the Union over the Constitutions and the legislative Acts of the particular States. If the State is subordinate to the law of the United States, it is so in the exercise of reserved powers over corporations as well as in anything else. If a provision prohibiting the employment of Chinese is contrary to a treaty which is part of the law of the land, it is contrary thereto, whether it prevents their employment by corporations, or whether it prevents their employment by natural persons. What trammels the State, viz. its position of subjection to the laws of the United States, in the one case, trammels it in the other. The proposition that the moment you leave natural persons and come to artificial persons, the State resumes an uncontrolled supremacy, is one the statement of which is its own immediate refutation. If the State of California were a supreme power, if it were perfectly unfettered and uncontrolled by the Constitution and the laws of the United States, it could, like any other independent State, forbid the employment of Chinese by private persons or any other persons, just as it could forbid the employment of people who were red haired, or just as in this country Jesuits were prohibited under pains and penalties from taking up their residence in the country. According to the ideas of to-day it would be wrong to do so, but the State would have a right to do so.

The framers of the new Constitution of California seem to have had this quibbling distinction between artificial and natural persons rumbling in their brains, because, despite of the keen antagonism ostentatiously displayed to the employment of Chinese, no direct provision has been made against their employment by private persons, and the second section of article xix. relating to corporations is the only one which as yet the Legislature has attempted to enforce by an Act.

The real and only question is whether the second section of article xix. of the new State Constitution, and the Act passed in pursuance thereof, are in violation of the Constitution of the United States, or of any law made in virtue of the powers conferred by the Constitution. If so, they are void. On the subject of the limitations of the powers of individual States by the Constitution of the United States, and the function of the judiciary in deciding questions of conflict or supposed conflict, Chancellor Kent has made some instructive remarks, expressed with his usual clearness, in his Commentaries (vol. i. 448). The sixth article of the original Constitution of the United States declares that "this Constitution and the laws . . . made in pursuance of it," etc., "shall be the

supreme law of the land." On this Alexander Hamilton, the well-known American statesman, remarks: "This results from the very nature of political institutions. A law by the very meaning of the terms includes supremacy. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its Constitution, must be supreme over those societies and the individuals by whom it is composed. . . . A State Constitution is then, in a just and appropriate sense, not only a *law*, but a supreme *law*, for the government of the whole people, within the range of the powers mutually contemplated and the right secured by it" (*The Federalist*, No. 33, quoted in Story's Commentaries on the Constitution of the United States, sec. 340, fourth edition). And to use the words of Mr. Story, "The right of all Courts, State as well as national, to declare unconstitutional laws void, seem settled beyond the reach of judicial controversy" (Commentaries, sec. 1842).

The first ground on which it is said that the provisions in regard to the Chinese are in violation of the supreme law of the land, is that it is in violation of the treaty between the United States and China of July 28, 1868, commonly called the Burlingame Treaty. This at first sight appears a little strange to us, because a treaty has not with us a municipal effect *per se*. It requires for that to be followed by a legislative Act. But it is different in the United States. "A treaty," said the Supreme Court of the United States in the case of *Foster v. Neelson* (2 Peters' Rep. 314), "is in its nature a contract between two nations, not a legislative Act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is intra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established." The principle established is to be found in the Constitution itself, which, after stating that "no State shall enter into any treaty, alliance, or confederation" (article i. sec. 10), and that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present shall concur" (article ii. sec. 2), provides that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and *all treaties* made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any States to the contrary notwithstanding."<sup>1</sup> The doctrine here explicitly

<sup>1</sup> On the subject of the binding effect of a treaty even on Congress, and a narrative of the disputes on this subject, see "Kent's Commentaries," i. 286, 287. Mr. Dallas, the United States Minister to England, in a letter in 1860 (Letters from London, ii. 208), intimates not so much his dissent as his desire that the supreme power of the United States had dissented from the views of Chancellor Kent. "It



declared of the place of treaties as part of the supreme law of the land, even though not followed up by an Act of Congress, and of their supremacy over the constitutions and laws of individual States composing the confederation, even in regard to matters of municipal law, has been supported by many decisions of the American Courts. In *Ware v. Hylton* (3 Dall. 236), a case decided soon after the adoption of the Constitutions of the United States, Mr. Justice Chase said, "A treaty cannot be the supreme law of the land—that is, of all the United States—if any Act of a State Legislature can stand in its way. . . . If a law of a State contrary to a treaty is not void, but voidable only by repeal or nullification by a State Legislature, this certain consequence must follow: that the will of a small part of the United States may control or defeat the will of the whole." In *Chirac v. Chirac* (2 Wheat. 259) the Supreme Court of the United States held that under a treaty with France French citizens had a right to purchase and hold lands in the United States, and that they were in the same position as United States citizens; and in this case, it is said, the State law was hardly referred to. In the recent case of *Hauenstein v. Lynham*, an action by Swiss citizens, heirs of an alien who had died in Virginia possessed of property there, to recover the proceeds thereof, the Courts of Virginia held that under the laws of Virginia the property escheated to the State; but the Supreme Court reversed, on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation.

The treaty between China and the United States contains the following provisions:—

Article V. The United States and the Emperor of China cordially recognise the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents.

Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favoured nation. And reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favoured nation.

The treaty recognises the natural and inalienable right of man to change his home, and the mutual advantage of the free migration may be doubted," he says, "whether the check upon executive discretion be not in this sphere of public agency better ascertained here than with us."

"The constitutional power appertaining to Parliament in respect to treaties is limited. It does not require their formal sanction or ratification by Parliament as a condition of their validity. The proper jurisdiction of Parliament in such matters may be thus defined: First, it has the right to give or withhold its sanction to those parts of a treaty that require a legislative enactment to give it force and effect, as, for example, when it provides for an alteration in the criminal or municipal law, or proposes to change existing tariffs or commercial regulations."—*Todd's Parliamentary Government in England*, i. 160.

and emigration of American and Chinese citizens respectively from the one country to the other. By the Constitution of the State the Legislature is enjoined to discourage the immigration of Chinese by all the means within their power.

The treaty secures to Chinese subjects residing in America "the same privileges, immunities, and exemptions in respect to travel and residence as may there be enjoyed by the citizens of the most favoured nations." It may be difficult to define what these privileges are; it may be difficult to draw the line where they begin and where they end; it is clear, however, that they include all privileges which are fundamental. It may be difficult to draw the line between what are fundamental and what are not; but it is clear that the right to labour, which in the case of a Chinese immigrant is the same as the right to live, is within the class of fundamental privileges. It is equally clear that a prohibition of employment by a whole class of persons, viz. corporations, is a restriction on the right to labour, and it is therefore a partial deprivation of one of the privileges of the citizens of the most favoured nations. How can it be said that a person possesses the privileges of a citizen of the most favoured nations if he is prevented by a total or a partial restriction from earning his living?

There is abundance of authority in the decisions of the American Courts to guide in the construction of the terms "privileges and immunities." The fourth article of the Constitution says, "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The privileges of citizens of the *most favoured* nations must be the same except in so far as they depend on the possession of the right of citizenship itself, *e.g.* the right to the elective franchise. In *Corfield v. Coryell* (4 Wash. C. C. 380) Judge Washington says:—

We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong to *the rights of citizens of all free governments*, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.

And in construing the words "privileges and immunities of citizens of the United States" (and the citizens of the *most favoured* nations must have these, with the exception already noted), occurring in the Fourteenth Amendment to the Constitution, the Supreme Court of the United States adopted this statement as applicable to the construction of these words (*Live-Stock Dealers and Butchers' Association v. The Crescent City Live-Stock Landing and Slaughter-House Company*, 16 Wall. 76). Mr. Justice Field

says, "Clearly among these [privileges and immunities] must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."

It cannot be said that the enactment prohibiting corporations from employing Chinese is a mere police regulation, and so does not impinge upon the conditions of the treaty. Power to regulate labour is one thing, and power to prohibit labour is another thing. A prohibition imposed upon a whole class of persons, such as corporations, is a prohibition inimical to the possession by the Chinese of privileges and immunities secured by the treaty.

The second ground for holding that the enactment in question was in violation of the supreme law was that it was contrary to the Fourteenth Amendment to the Constitution of the United States, published as duly ratified, July 8, 1868. This amendment was passed after the fall of the Confederacy, and its object was to abolish slavery and put the negroes on the same footing as white men. This Fourteenth Amendment provides that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." A section in the Revised Statutes passed to give effect to this amendment is also founded upon by the judges of the Court of California; but it is unnecessary to consider this, because if the provision in the section of the statute extends farther than the provision in the amendment, it is of no avail against the State of California or any other State which is bound only by the Constitution and any laws passed in pursuance thereof; and if it does not go farther, then we need not trouble ourselves about it. The first clause of the portion of the amendment quoted does not seem, although the Californian judges thought it did, to have much relation to the question. The expression "due process of law" points at judicial proceedings. If a man is deprived of life, liberty, or property according to the "due process of law" for the time being, there is no infringement of the Constitution. Mr. Cooley, the editor of the fourth edition of "Story's Commentaries," in his comments on this subject says, "The deduction is that life, liberty, and property are placed under the protection of known and established principles which cannot be dispensed with either generally or specially; either by executive officers or by legislators themselves. . . . Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs." We differ. The Legislature can dispense with anything, so far as not prevented by the Constitution. If the Constitution permits some legislative Act to be done which cannot stand the test of reason and justice, that is a matter which

ought to have been looked after by those at whose instance the Constitution was framed or at whose instance it may be altered. And what the Constitution provides is easily ascertained in the United States. The Constitution is written. It is an obvious observation that all this illustrates the evils of a written Constitution. Where the Constitution is mainly founded on gradually accumulating custom, the Constitution, by natural process and simultaneous movement, grows with the growth of the nation and strengthens with its strength. It is otherwise when the Constitution is mapped out, defined, "cabined, cribbed, confined" in writing. Mr. Cooley speaks about "due process of law" meaning such an exertion of the powers of government as the settled maxims of law permit and sanction. But surely the Legislature can alter the settled maxims of law as it likes, so far as not controlled by the Constitution. The settled maxims of law are altered, overturned, reversed continually by the Legislatures of all countries.

The other clause in the Fourteenth Amendment is more to the purpose. No State shall "deny to any person within its jurisdiction the equal protection of the laws." Here there are no words indicating that the action of courts of justice is alone contemplated. The Chinese do not enjoy the equal protection of the laws if they are subject to restrictions on their right to labour to which other people are not subjected, and if they are debarred from a large field of labour which is perfectly free to all citizens and all other foreigners, no matter what their nation or race or colour or creed may be. It is not clear that the word person is to be construed in its widest acceptation, and probably it should be held that the context points to natural, and does not include artificial persons. But if the term "person" should be construed in its widest sense, the provision would be violated by the prohibition imposed on corporations, who have not the equal protection of the laws, if they are not allowed to go into the labour market as free from restrictions as ordinary individuals are, and are consequently placed at an unfair disadvantage in their competition with other employers. In the case of *The Live-Stock Dealers and Butchers' Association v. The Crescent City Live-Stock Landing and Slaughter-House Company*, Mr. Justice Miller says: "In the light of the history of these amendments, and the pervading purpose of them, . . . it is not difficult to give a meaning to this clause. The existence of laws, in the States where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . . We doubt very much whether any action of a State not directed against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other." We do not

agree with this. We do not think "the history of these amendments" has much to do with the matter, any more than the history of the Factory Acts in this country, or the discussions which took place, say, in the Committee of the House of Commons, has got to do with the construction to be placed on these Acts. It is the provision itself which is to be looked at, and the terms in which it is expressed are to be construed in their plain and obvious meaning. Besides, in the earlier portion of the amendment certain declarations are made in regard to the right of "citizens," and it is said that all persons born or naturalized in the United States shall be citizens thereof—which of course includes negroes. But in the clause in question another expression is used, "any person," not "any citizen." A term more extensive than that which includes negroes is employed, and hence the provision must apply to some persons outwith the category of negroes. But indeed no expression more extensive than the expression "any person within the jurisdiction" of the State could be employed. If a black man is entitled to the equal protection of the laws, as coming within this category, there is no reason why a yellow man should not.

The conclusion of the whole matter was this, that the Circuit Court of California held the second section of the nineteenth article of the Californian Constitution and the Act of the Legislature prohibiting the employment of Chinese void, as being in violation of the treaty with China and the Fourteenth Amendment to the Constitution of the United States, both of them parts of the supreme law of the land.

It is with no little pleasure that we have read the report of this judgment. That it is a just decision we have no doubt whatever. But in order to be just one requires to resist the influences by which he is surrounded—the subtle and permeating influences which creep unconsciously into the mind, and indeed become part of the mind itself; and to do so requires some firmness and some fortitude. To the influences of popular opinion the American judges are exceptionally exposed, deriving their authority from a more popular and fluctuating source than our judges do, and holding their office by a less secure tenure. These popular influences were in the present instance exceptionally strong. The feeling of the populace in California has been running in a swift and steady current against the Chinese immigrants. The antipathy to these competitors in the labour market had been displayed not alone in vague unformulated opinion which might be felt, but which it was not incumbent to recognise. It had found expression in the Constitution of the State and in the Act of the Legislature. But the Californian judges have plainly told the people and the Legislature that they were there not to execute the behests either of the people or of the Legislature, but to administer justice according to the Constitution of the country. They were, to use the words of one of the greatest of Scotsmen—they were in the place where they were demanded of their conscience to speak the truth, and therefore the truth they did



speaking, impugn it whoso list. It is not the first time in history that reason and rectitude and respect for the laws and the Constitution, hunted from every other asylum, from the Council and the Senate, even from the hearts and minds of men, have found a secure refuge in the courts of justice. It is a proud thing to be able to say that, no man be he ever so humble, no race be it ever so oppressed or despised, comes before the courts of Britain or America invoking the protection of the laws without finding that their trust has been securely placed. It is with pardonable pride that we in Scotland can remember that it was in our courts the first judicial declaration was made of the great principle that the moment a slave set his foot on British soil, his bonds fell from him, and he stood a free man. The fearless independence and uprightness of their judges, their steadfast purpose to uphold the laws and constitution of the commonwealth, is one of the proudest possessions of the Anglo-Saxon people. And it is a valuable possession. Nothing more tends to give stability to any society than the existence of men in it who, when they have discovered what they believe to be the reason and truth and justice of a case, can say, despite every adverse influence, "On this rock I take my stand; come what, come may." In our own country, in old time and in new, our judges have with an equal mind maintained the laws of the land against prince and peer, and Parliament and people; and we are proud to recognise that among "our kin beyond the sea," the judges, in opposing influences which have assumed a novel form, but which are of a not less menacing character, have exhibited the spirit of their race and have maintained the honourable tradition of their honourable office.

D. C.

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## THE CONSEQUENCES OF A TECHNICAL ERROR.

*(Communicated.)*

SOME year or two ago, in the pages of this Journal, there appeared an article dealing with the leading decision in England and in Scotland upon the marking of ballot papers at Parliamentary and Municipal elections. In that article comments were made upon the spirit of the decision in either country, and an endeavour was made to show how the English judges, in the opinion of the writer, by straining, or at least by a too rigid adherence to, the terms of the statute, had done an injury to the force and effect of the Ballot Act; whereas the judges in Scotland, by taking a broader view, had rendered it possible for the vote of any elector to be efficacious so long practically as it was clearly evident for whom that vote was intended, even though from infirmity, age, or other cause imperfections in the formation of the  $\times$  or irregularities in its position on the ballot paper might have at the outset created difficulties.

A very strong example of the severe consequences which in

England may result from a technical error has lately been seen in the case of *Gothard, etc., Petitioners v. Clarke, etc.* (C. P. Div., April 26, 1880). The election in question was a municipal one, and the nomination took place in the usual manner, the nomination paper being signed by burgesses of the borough, according to the provisions of the regulating statute, namely, "The Municipal Elections Act, 1875" (38 and 39 Vict. c. 40). The second clause of the first section provides *inter alia* for a nomination in writing, and that the writing should be "subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. . . . The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2, set forth in the first schedule to this Act, or to the like effect." In the particular instance we are considering the nomination paper was duly filled up by the proposer and seconder, and by the eight assenters, but the number of one of these assenters on the burgess roll was incorrectly given as 695 instead of 704, which was the proper number on the burgess roll. The form of the schedule prescribed by the Act, after giving the name of the borough and the nature and date of the election, proceeds thus:—

We, the undersigned, being respectively enrolled burgesses, hereby nominate the following person as a candidate at the said election.

Surname.	Other Name.	Abode.	Description.

(Signed) A. B. of \*  
C. D. of \*

We, the undersigned, being respectively enrolled burgesses, do hereby assent to the nomination of the above person as a candidate at the said election.

Dated this                      day of                      18 .  
(Signed) E. F. of \*  
G. H. of \*  
and six others.

\* The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll.

We have been careful to give in full the form of the schedule, because it is a very important factor in arriving at an opinion as to the character of the objection taken to this nomination, and generally as to the value of these technical questions.

In Mr. Gothard's case the error arose in somewhat a peculiar way, as the person who filled in the nomination paper had taken

the number from a copy of the burgess roll certainly, but from what turned out to be an uncorrected proof. It was openly admitted, and will be found to have been so on reference to the report, that no person was misled, *or could have been misled*, by the inaccuracy in the elector's number, and further, that in every other respect the nomination paper was unobjectionable. On this particular ground, however, an objection was made, and the mayor, who was the returning officer, sustained it, and thus it came about that the other candidate (or rather body of candidates, for several were nominated together) was declared duly elected.

Let us now turn to the other Acts of Parliament which have a bearing on this question. Firstly, then, we find that the Ballot Act, 1872 (35 and 36 Vict. c. 33), in its 13th section provides that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." These rules are scheduled as in the Municipal Elections Act, 1875, and the forms are the same, with the exception of the note as to the number on the burgess roll, and the situation of the property qualification of the nominating, seconding, or assenting burgess. Secondly, we have in the Parliamentary and Municipal Registration Act, 1878 (41 and 42 Vict. c. 26), a provision (section 41) that "section 13 of the Ballot Act shall, with respect to any municipal election, apply to non-compliance with any of the provisions of or mistake or error in the use of any of the forms prescribed by the Municipal Elections Act, 1875." Surely it may be said, as indeed it was strongly argued, this was enough to allow of the correction of the error. What was the intention otherwise of making any such provision in this latest municipal statute in 1878? It could only be to give effect to principles rather than to technicalities, and to see that justice was done. The result of the action of the mayor was to strike out of the list of candidates a body of gentlemen who had the undoubted support of a large number of ratepayers, by whom they were chosen as candidates for the magisterial offices of the borough, and the action of the mayor, who thus got rid of them, ought, we think, to have been reviewed and considered. There was also the argument founded upon the provision of the 1875 Act we have already quoted. It is not so stated in the report, but it seems probable that this argument was twofold, embracing on the one hand the force of the words "or to the like effect," which follow the directions as to the use of the scheduled form, and on the other hand pointing out the peculiarity in the schedule itself of the shape in which the direction as to the number of the burgess is given. It will probably have been observed from the

specimen we have given that this direction occurs not merely in a schedule, as to the strict unbending application of which there are relaxing clauses in other Acts made applicable to the particular one we are discussing, but also that it is given in a sort of footnote to the schedule, of which it can scarcely be properly said to form a part. Finally, we may observe that the whole thing is a matter not of enactment and obligatory force in this view, but rather of direction for the carrying out properly the Act, of which the principle and the spirit, rather than the letter and the stern form, are to be desiderated.

To these arguments, however, the Court seems to have turned a deaf ear, and their judgment finds that, firstly, the provisions of the Act 38 and 39 Vict. c. 40, were obligatory, and not merely directory; and secondly, that section 13 of the Ballot Act did not apply to questions raised before the returning officer in this way. It followed that if every bit of the schedule was obligatory it had not been complied with, and if it could not be remedied then there was an end of the business. What strikes us with astonishment especially in this instance is the remarkable position of impregnable wisdom in which a returning officer in England seems to be placed by the judgment. Mayors of boroughs (we do not even know what the borough was in this case) are not usually trained men of the law, and not unfrequently absolutely ignorant of it, yet, if we have not misunderstood this decision, Justices Grove and Lopes have refused to consider the provisions of a section of the Ballot Act expressly, by a separate statute, declared to apply to the Act, of which the interpretation was *sub judice*, on the ground that these provisions all passed in the interest of justice to the spirit rather than to the letter did not apply to questions arising as this one did. That section of the Ballot Act seems to us to contain two grounds on which the validity of an election may be defended: 1st, that the *principle* on which it was conducted was in accord with that of the body of the Act; 2nd, that there was not any effect upon the result of the election produced by the non-compliance. Here of course the case was one not of declaring an election invalid, but it might be called of nipping it in the bud, and we think that, *mutatis mutandis*, the same rules ought to apply. Again, of course the result of the election itself was affected by what was done in non-compliance with the words of the schedule, but it was so affected by getting rid in summary fashion of the whole contest. We further venture to point out that the election, or rather the nomination, as the initiatory stage of the election, was conducted in accordance at any rate with the general spirit of the Act, and that being so, the result attained is much to be regretted. It is to be hoped that the day is far distant when to such technical objections any court in Scotland would give effect. As has been pointed out often before this, love of technicalities is not a little interwoven with an elaborate system of reporting.

English lawyers are governed to an amazing degree by precedent, and they pile authority upon authority so as to make what they deem an impregnable position, though in truth the lowest brick of the structure may be an unsound one. They will go back to the most astonishingly ancient cases, quote them, be listened to, and actually get judgments in their favour, and this because the noble army of reporters has been working for the amplification of the law since time out of mind it may be said. It is different with us here in Scotland. An authority before the days of the legal lexicographer Morrison is rarely quoted, and as rarely receives much attention; even the earlier days of the Faculty Reports excite little judicial comment, and less enthusiasm. Untrammelled by so severe a system, authority and precedent receive their just weight, but equitable considerations and principles also are regarded. As the present system continues this may change, still it is to be hoped that we are yet a long way from the risk of having technical rules applied in the manner in which they have been in *Gothard v. Clarke*.

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## TREASON AND TRIALS FOR TREASON.

### NO. III.

THE reign of Charles I. certainly affords the materials for one of the most interesting and romantic chapters in the history of treason. In addition to the "blessed martyr" himself, whose offence was alleged to be treason, we have the cases of Laud and Strafford, in whom some people, even to this day, can discover the elements of the saint and the hero. Strafford kneeling to receive the blessing of his spiritual father the imprisoned primate, himself awaiting a similar doom, and Charles blotting with his tears the parchment which was to consign his faithful servant to a cruel death, are touching pictures. There is a certain novelty too about the circumstances of the great treason trials of this reign. If not altogether unprecedented—we have to go back centuries for a precedent—we find, as we found in the reign of the second Richard, another power besides that of the king arisen in the State, and strong enough to call men to account for the excesses of what at one time might have been honoured as devoted loyalty.

And yet, as pointed out by Mr. Bund, this reign "contains no legislation on the law of treason; we also meet with comparatively few trials for this offence." But there were one or two very important points decided. Thus the judges called together for consultation on the course to follow in the case of one Pine, came to be of opinion that mere words, though evidence of a



corrupt heart, could not be in themselves treason, nor could an indictment for that offence be framed upon them. Pine had expressed but a poor estimate of the royal character. A friend had informed him that he had seen the king, and this led Pine to observe, "Then thou hast seen as unwise a king as ever was, and so governed as never king was, for he is carried as a man would carry a child with an apple: therefore I advised men to refuse to do our duties to him." Several of the cases in point quoted at this judicial consultation seem to have occurred in the reign of an equally unfortunate monarch, Henry VI. One woman was then put to death for having called the king a fool, and a known fool throughout the whole kingdom of England, and for similar expressions others were at least indicted. It is difficult to imagine Pine escaping a charge of treason in the reign of Elizabeth, or even in that of her immediate successor; but the judges of Charles, in spite of Court influence and a long string of precedents, found that his offence was not treason. Another point gained for the cause of freedom arose in the case of the notorious Felton, who was threatened by Laud with the rack if he would not disclose the names of his associates. But it is singular to find the question at once raised, even amongst the members of Council themselves, whether the threat thus made by the most reverend father could be lawfully carried into execution, when we recollect how systematically torture had been used throughout the reigns of the Tudors and of James, and the important evidence for which Government had to thank its use. This hesitancy where the murderer of a great Court favourite and powerful noble was concerned is certainly surprising, and marks a decided advance upon the former state of things. The question was put point blank to the judges, whether Felton might be racked, and the answer given unanimously was that no such punishment was known in law. Again, the judge in this case decided that the arbitrary punishment of cutting off Felton's hand, which it was proposed to inflict prior to execution, could not be permitted on the ground that in all murders judgment was the same. "It is the fashion," says Mr. Bund, "to abuse Charles I.'s judges, to speak of them as persons who betrayed their country and the liberties of their countrymen. They may have done so. But having regard to the position in which they stood, it will be difficult to find any body of men who did more to check the royal prerogative, more to secure the happiness of the subject than those judges who decided, while Charles was yet in the height of his power, that words were not treason, that torture was illegal, that the king could not alter the sentence prescribed by the law. When viewing their conduct in the cases of the five knights, of Eliot, of ship-money, and joining in the blame their decisions have brought upon them, it should be remembered that they also decided Pine's case and Felton's case."

A very different kind of interest attaches to the case of Lord

Rea, which exhibits the whole preliminary process of a trial by battel in the Court of Chivalry ; and a curious process it is, a strange mixture of a tournament and an ordinary civil lawsuit, one by which we could imagine Don Quixote and Blackstone being alike attracted. Even at that period such a mode of settling a dispute was unusual, and indeed antiquated, and it is somewhat difficult to find the record of a case in which there really was a combat after all in spite of the bold challenges and readiness expressed to defend pleas with the pleader's body which enliven the old English law reports from time to time.

In cases of treason the battel could only take place in the Court of the Constable and Marshal, a court which, it seems, had to be revived to meet this special case of Lord Rea. In fact, had the Crown refused to appoint a constable, the appeal for combat would have been made in vain. The Court of the Constable and the Marshal was a formidable institution at one time, and in the reign of Richard II. its jurisdiction had to be defined, as the Commons were making grievous complaints of its encroachments. Latterly the criminal jurisdiction of this Court seems to have been restricted to cases of treason arising without the realm. The vanquished party, if he survived the combat, was treated just as if a verdict had gone against him, and might then be sentenced and punished.

The origin of Rea's case we relate in the words of Justice Whitelock, who was present at a consultation of the judges held for the purpose of deciding the procedure. "The matter consulted of was to give our opinion concerning the conference had in Germany between certain Scottish gentlemen about the making of the Marquis of Hamilton the head of a party against the king and his kingdoms of England and Scotland. The Lord Rea, a Scottish baron, did impeach Ramsay and Meldrum for moving him to this conspiracy ; they denied it punctually, and no witness could be produced. Ramsay, a soldier, offered to clear himself by combat that he was innocent, and the appellant accepted of his offer. The king was desirous it should be put upon a duel, and we were consulted with, first, what the offence was, and second, where the trial might be. We all, with the Lord Keeper, were of the opinion, first, that it was a high and horrible treason if that in the examinations were found true ; secondly, that the trial might be by an appeal of treason upon which the combat might be joined, but the king must make a constable *durante bene placito*, for the marshal could not take the appeal without him, that it must be after the manner of the civil law, and we not to meddle in it."

Accordingly great preparations were made. Lord Arundel and Surrey was the Earl Marshal, who came into the Court ushered by nine heralds with their sergeants-at-arms. The Scottish Earl of Lindsay was appointed Lord High Constable, and along with him were a number of special commissioners. After the commission

from the king to the constable had been read, his silver staff of office, half a yard long, headed with a crown of gold, was delivered to him. Then was brought in the appellant "apparelled in black velvet, trimmed with silver buttons, his sword in a silver embroidered belt, his order of a Scotch baronet about his neck," accompanied by four sureties and his counsel. The defendant then appeared, dressed in scarlet and silver lined with sky-coloured plush. Proceedings commenced by the Earl Marshal expounding "the laws of the Court of Chivalry and the manner of proceeding therein, according to the law and custom of arms, showing that it was as legal and agreeable to right and justice as any judicial process in any other court of this realm, especially when the nature of the cause required it." This was supplemented by a speech from Dr. Duck, the king's advocate, upon apparently the same subject. Lord Rea's appeal was read, in which was set forth the treasonable conversation which he alleged Ramsay had held with him, and it ended thus: "But if thou, the said Ramsay, shall deny the premises, or say thou hadst not the same discourse, or to the same effect, with me at the aforesaid time and places, I, the aforesaid Donald, Lord Rea, say and affirm that thou, David Ramsay, art a false traitor, and liest falsely. And in case the premises cannot otherwise be found out by the sentence of this Court, proffer myself ready, by the help of God, to prove and justify this my accusation and appeal by my body upon thy body, according to the law and customs of weapons, in a duel to be performed in the presence of our lord the king."

After the challenger had flung down his glove in presence of the Lords Constable and Marshal, the defendant delivered his answer, in which he denied the accusations, and declared his readiness "to justify and prove this in a duel, according to the laws and customs of arms, and of this Court, by his body upon the body of the said Donald, Lord Rea, as it should seem good to the Court." And then he threw down his glove also. The gloves were duly picked up and handed to the Lord Constable by the herald, and the parties were placed under arrest until they had produced lists of sureties, which seems to have been immediately done. But matters were not yet ripe for the combat, as one might have imagined they should now have been. The Court was adjourned for the purpose of hearing Ramsay's defence, a long document handed in at the next meeting, and counsel was then heard on his behalf, who stated reasons why his client could legally decline to fight, and witnesses were then examined. It was not until the Court had held a third sederunt, as we should call it, that the Earl Marshal gave a sort of judgment, the effect of which was to shut the parties up to fight, and their bill of appeal and defence was read, signed, and sealed by them. The award of battel was then given by the Lord Constable, who, "taking the bill of appeal in his hand and folding it up, put it in the glove which Lord Rea had cast forth in

the Court for a pawn in their behalf, and held the bill and glove in his right hand, and in his left hand the answer and glove or pawn of David Ramsay, and then joining the bill and answer and gloves, and folding them together." The award proceeded in the name of the Trinity, "the only God and Judge of battles," and fixed the place and day and hour of meeting.

Lord Rea then delivered a speech, a sort of protest of the nature of our Scottish oath of calumny, and expressing his cheerful acquiescence in the duel now decreed. Ramsay's application for an earlier day was unsuccessful. The parties were released from imprisonment, but restricted to certain localities. Lord Rea was not to go westward beyond Charing Cross, nor Ramsay eastward beyond Whitechapel. To each of them were assigned a spear, a long and short sword, and a dagger. Lord Rae made a number of applications: "for a chirurgeon with his ointments and instruments;" for "a seat or pavilion or other coverture to rest himself, that he might have bread, wine, or other drinks, iron nails, hammer, file, scissors, bodkin, needle, thread, armourer and tailor with their instruments, and other necessaries to aid and serve him, and about his armour and weapons, apparel and furniture, as needs required." He asked the Court to provide "that his adversary should not be permitted to make him stay and attend too long under pain of being convict," to guard the lists, to permit him to ride out and view the ground, and if he fell to grant leave to his friends to give him Christian burial. His various petitions were severally dealt with by the Court, as was also an application relating to the arms to be used made by his opponent. The day fixed for the duel was 12th April 1632. On the 10th the Court again met in the Council Chamber, Whitehall, when an adjournment of the duel until the 17th of May was announced. Another meeting of the Court, and the last, was held on the 12th of that month, when the Constable and Marshal announced that both Rea and Ramsay were to be sent to the Tower "till by sureties, to be approved by his majesty, they gave in sufficient caution that neither in their own person, nor by any in their families, nor by their procurement or assent they would attempt anything the one against the other, and that as long until it seemed good to his majesty to set them at liberty." This was followed by a royal letter revoking the authority which had created the Court and legalized the trial. Thus by a simple exercise of the royal authority all this pomp and ceremony, all the legal ingenuity exhibited in petitions and answers, and the speeches of counsel went for nothing, and the very tribunal itself vanished from existence. A trial by battle was, as many of our readers know, attempted for the last time in the year 1819.

In the Earl of Bristol's case the question was raised, "whether a person arraigned of treason or felony ought by the fundamental laws of this realm to have counsel?" The king had granted

counsel to Lord Bristol, who was accused of treason, and now wished to test the legality of this royal act. The answer was unanimous. Counsel could not be allowed in such cases except upon a matter of law. It may be prejudice and ignorance on our part, but this principle of the English criminal law has always seemed to us most unreasonable and inconsistent, and the existence of such a rule down to modern times a remarkable instance of blind conservatism. We call it inconsistent, for if it be also a principle of the law that an accused person is presumed to be innocent until proved guilty, why place him under any disadvantage? The distinction too between civil and criminal proceedings is not so marked in England as in Scotland. In the former country a private individual may sue, whether it be in the criminal or civil court, but the plaintiff had never the advantage over the defendant which this law awarded to the prosecutor. And why draw a line between great and minor offences? The object of a court of law is to acquit the innocent and convict the guilty, whatever be the charge made against them; and if the charge is a serious one, the accused has all the more need of counsel. The Scottish lawyer may well feel a sense of honest pride when he calls to mind that never, even in the darkest days of the Lauderdale ministration, was a prisoner in this country left defenceless by the operation of the very law which was bound to protect him.

In the case of Bensted (who was one of a set of rioters who aimed at the destruction of Archbishop Laud) it was held by a majority of the judges that to break open a prison in which there are traitors and thus enable them to escape is in itself an act of treason, although the prison-breaker did not know that there were traitors within its walls. It may be difficult to reconcile this decision with the letter of the treason statutes, and its soundness has been questioned, but surely it is not inconsistent with the principle by which a person who does an unlawful act is liable for the consequences, whether it brings about what he intends or not.

The case of Goodman illustrates the peculiar position with regard to his Parliament in which the unfortunate Charles found himself by the year 1641. Goodman's treason consisted in the fact that he was a Jesuit found resident within the realm for a period exceeding forty days. It was a second offence, and he was condemned to die. He obtained a royal reprieve, as Charles thought there had been no instance either in the reign of his father or of Elizabeth in which religion alone could be said to have been punished with death. The House of Commons resented this exercise of royal clemency and took measures to have a conference with the Lords, whose assistance they desired "to discover such instruments as have dared to intercede for the interruption of public justice against such offenders." The poor king tried in the first place to get out of it by engaging that the obnoxious Goodman should be imprisoned or banished "to secure his people that this



man should do no hurt." But this did not satisfy the Houses of Parliament, who went on to point out specific reasons for enforcing the law, such as the spread of Popery, the existence of a Papal Nuncio in London, and triumphantly they "do further inform that some Jesuits and priests had been executed in the time of Queen Elizabeth and King James of happy memory." Charles of course had to give in, hinting at the same time that such severity in England might prejudice the condition of Protestants abroad. "Seeing," he says, "I am pressed by both Houses, I give way to his execution because I will avoid the inconveniency of giving so great a discontent to my people as I conceive this mercy may produce, therefore I do not resist this particular course to both the Houses; but I desire them to take into their consideration the inconveniences as I conceive may upon this occasion fall upon my subjects and other Protestants abroad, especially since it may seem to other States to be a severity: which being thus represented I think myself discharged from all ill consequences that may ensue upon the execution of this person." Poor Goodman himself presented a petition to the king, in which, instead of craving mercy, he says, "These are humbly to beseech your majestie rather to remitt your petitioner to theire mercyes that are discontented than to lett him live the subject of so great discontent in your people against your majestie; for it hath pleased God to give me the grace to desire with the prophett that if this storme be raised for me, I may bee cast into the sea that others may avoyde the tempest."

Under the Commonwealth the Duke of Hamilton was tried for treason, and he took the plea that he was not an English subject, and that in invading England with an army he was only obeying the Parliament of his native country. He had counsel assigned to him, one of whom was the celebrated lawyer Hale. There was a peculiarity in the case arising from the fact that the duke held the English title of Earl of Cambridge, and was the son of a naturalized Englishman, although born before the Act of naturalization had been passed. Hale made a great speech upon the various points raised, and founded upon the precedent of David Bruce, King of Scotland and Earl of Huntingdon, who, it was found, could not be tried as a traitor in England. On the other hand, the counsel for the people (who had succeeded in office the Crown officials) maintained not only that the duke was an English subject, but that as Scotland belonged to England, the Scotch were not in the position of aliens, but subjects. The Court sustained both of these pleas, and this faithful royalist followed his sovereign to the block and died as a traitor.

W. G. S. M.

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## DELAYS IN PROSECUTIONS.

THE Act of 1701, c. 6, confers upon persons committed to prison for crime the power of compelling the prosecutor to bring them to trial within a limited period therein defined. Upon the prisoner's being committed for trial he may present a petition to the judge applying for letters of intimation to the Lord Advocate or the Procurator Fiscal, as the case may be, calling upon him within the next sixty days to fix a diet for trial. Without entering into details, it is sufficient for our present purpose to say that one hundred and forty days is the longest period during which a person accused and committed for trial, if he uses the means which the Act puts within his power, can be detained in prison before his case is brought to final sentence.

It is not to be supposed that but for the statute a prisoner would have no right to demand that he shall not be kept in prison for an indefinite period at the pleasure of the prosecutor, or that the Court has no power to interfere in preventing undue delay in bringing cases to trial. Prior to the passing of the statute we find instances of persons accused complaining of undue delay, and we find the Court exercising its right of interference to protect the liberty of the subject, and control what, but for it, would have been the arbitrary discretion of the prosecutor. Baron Hume in his *Commentaries on the Criminal Law of Scotland* (ii. 98), in treating of "those provisions which the law has made to hasten the trial and shorten the confinement of such unfortunate persons as cannot find or are not entitled to bail," observes: "This important object was not entirely unprovided for in the rude condition even of our ancient practice; as indeed it is obvious that by its very constitution every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the name of the accuser. Accordingly our judges seem always to have been in the use of listening to complaints of this sort, and granting redress on the prisoner's petition according to the pressure of the case." And he gives some instances of the prisoner being released at once where the wrong was undeniable; and other instances of intimation being given to the accuser, and sometimes even to the magistrates, keepers of the jail, and for obliging them to say by a certain day whether they were to insist against the prisoner, and within what time, "wherein if the accuser failed by not appearing on this notice, or not complying with the order to fix a day for insisting, the prisoner was then released, on finding caution to answer at any time when he should be afterwards called on." Sometimes the Court at once fixed a day for insisting against the prisoner, and made intimation to the informer

that liberation would be granted if he was not then ready to go on. An Act of Adjournal in 1675 ordains the magistrates of Edinburgh, and the "guidman of the Tolbooth," not to receive any prisoner unless the person bringing him found caution to insist within a limited time—a pretty sharp preventative of undue delay, and which seems pointed at prosecutions by private persons—a thing practically obsolete now.

The common-law right of the accused and the common-law power of the Court still subsist. The Act of 1701 did not supersede the common-law right. It merely provided a convenient and more efficacious means of exercising the right. On cause shown the Court would still interfere, even if no letters of intimation had been made. (See case of *Keith v. Lord Advocate*, June 4, 1875, 2 Rettie (Justiciary), 27.)

The means provided by the Act for preventing the undue detention of a prisoner in custody before bringing him to trial are effectual enough when they are taken advantage of, but as matter of fact they are seldom taken advantage of. The expense of applying for and obtaining letters of intimation and having them served is not great, but it is more than most prisoners are able to afford. Besides, few prisoners at the time of commitment have any means of obtaining legal advice. Consequently we sometimes meet with cases where an unfortunate wretch has been kept in prison an unconscionably long time before being brought to trial. Lord Young, to his credit be it said, when cases of this kind have come before him, as they not unfrequently have done, has never failed to comment in language, which we need hardly say was not wanting in incisive force, upon the injury done to the accused through the indolence or carelessness of the public authorities. In April last a man was tried before a sheriff and jury at Cupar for assault with intent to ravish. He had been committed in the preceding August, thus lying eight months in jail before being tried for an offence the usual punishment for which (it being a simple case of the kind, no aggravation of effusion of blood or serious injury to the person being libelled) is some nine months. The man was found not guilty. Such a delay followed by such a result is, we cannot help thinking, a kind of proceeding which deserves grave animadversion. There is substantially no redress in such a case. No doubt by rule 86 (23) of the rules for prisons in Scotland, approved of by the Secretary of State under the Prisons (Scotland) Act, 1877, it is provided that a prisoner acquitted or discharged without being brought to trial receives "the net profit of his earnings by work as entered in the governor's books." But this is poor enough consolation for the misery of confinement; and it affords no compensation at all (as indeed what could?) for the injury and injustice caused by what, even in the best view of the case, was needlessly long confinement. What is desiderated is not something that will compensate for

the evils caused by undue delay, but something that will prevent undue delay. In England we notice that when a trial is postponed from the assizes or sessions for which the accused has been indicted, which may be done at the instance of the prosecutor or the accused, the applicant "must satisfy the Court by affidavit that there is a sufficient cause for the postponement, such as the illness of the accused or the unavoidable absence of a material witness. . . . If the application for postponement be made by the prosecution, the defendant may be discharged on his own recognizances" (Harris' Principles of the Criminal Law, p. 354).

The Act 1701, c. 2, operates beneficially, but its operation is limited. It is, as we have pointed out, only in a comparatively few instances that it effects its object, viz. to prevent prisoners being kept an unduly long time in prison before being tried; because the poorer class of prisoners, that is to say, the vast majority of prisoners have neither the knowledge nor, what is of much more importance, the money requisite to set the machinery provided by the Act in motion. A suggestion has recently been made in a daily newspaper that the evils of the present system may be remedied by remunerating the poor's agents. The suggestion is not a wise one. In the first place, there is no chance of its being adopted. There is every likelihood that the expenses attendant upon the administration of justice will be cut down, and there is none whatever that the guardians of the public purse, tormented by that "eternal want of pence which vexes public men," will listen to a proposal to strike out a new way of adding to these expenses. In the second place, we do not see how the plan proposed would meet the difficulty of the case. Paying the poor's agents would not pay the expense of obtaining and serving letters of intimation, and that is the real and practical difficulty in the matter. And, in the third place, the suggestion assumes that it is only by setting the machinery provided by the Act of 1701 in operation that the evil adverted to can be obviated. Now, there is nothing magical about the Act. It is not one of the fixed laws of nature. Other means may be devised without putting any great strain upon one's ingenuity. Why not extend the principle of the Act to all cases?

It is to be remembered too that the scope of the Act is limited. At best it can only prevent unduly-prolonged confinement of the accused. It does not prevent undue delays in prosecutions. It applies only to the case where the accused is in custody. If a man is out on bail it never comes into operation, and if he gets out on bail after letters of intimation have been obtained, its operation ceases. (See the case of *David Balfour*, H. C., July 20, 1850, John Shaw, 377.)

If the principle, to carry out which the Act was passed, is good, why should it not be extended to all cases, whether the machinery provided by the Act be taken advantage of or not, or whether the

accused be in custody or not? If the principle of the Act is good, why should its operation be prevented by the poverty of the prisoner? Is not the case of a person who is poor and unprotected the very case where the law should step in and afford its protection? Is it not hard for a person of the better class who is able to get out on bail to have a criminal charge hanging over his head for an indefinite period? If the course of public justice has not been interrupted—if the public interest has suffered no detriment in the cases to which the Act of 1701 applies, and in which advantage has been taken of its provisions, and the trial has been forced on so that no longer a period than one hundred and forty days has intervened between the commitment and the sentence (surely a sufficiently long time for an innocent man or for any man to remain in prison untried, or even to have a criminal charge hanging over his head)—is there any reason to believe that the public interest would suffer detriment if the principle of the Act were fully carried out, and it were made imperative to bring all cases to trial, at least, not later than one hundred and forty days from the time of commitment, whether the accused ran his letters or not, or whether the Act allowed him to run his letters or not? It may be said that if this were done, it might interfere with our existing Circuit arrangements. Well, what if it did? If the principle is a good one, the machinery of justice should be altered, if need be, in order to give effect to it. It is to take a perverted, or rather an inverted, view of matters to hold that the principle must bend to the details, not the details to the principle. Besides, we do not think that there would be very many cases after all where the alteration suggested would cause the trial to come off before the usual time for holding the Circuit, and any that did occur could be provided for by sending the case to be tried before the High Court, as is not unfrequently done now when any emergency makes that course necessary or advantageous.

The subject about which we have been writing is one which we think deserves consideration—more consideration than many subjects about which more noise is made. We confess to have little faith in your great reforms, which people agitate about for years with a great deal of clamour and claptrap, which are to set everything and everybody right, and after which there is to be no more sin, or folly, or misery on the earth—all nonsense of that sort being to be stopped peremptorily and at once. We get them, and we find that we are pretty much where we were before. The Avatar of every new “fad” is the Avatar of a failure. It is your little reforms—reforms in matters that are apt to be overlooked—that are the most beneficial, because they have the most practical bearing on the social interests of men.

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## SUMMARY JURISDICTION.

THE summary procedure in criminal cases of the Sheriff and other inferior courts in Scotland was carefully considered by the last Royal Commission on our Courts of Law. As regards trials without a jury, almost the only recommendation they made in their Fifth Report was one which has been practically carried out by the passing of the Summary Prosecutions Appeals Act, 1875. They pointed out, that while in the majority of Sheriff Courts, and even in the least serious kinds of summary business, the old forms of the Act of Adjournal, 17th March 1827, and of Sir William Rae's Act, 9 Geo. IV. c. 29, were still followed, yet in some Sheriff Courts, and almost universally in Justice of the Peace Courts, it was the custom to use the forms of the Summary Procedure Act, 1864. The effect of this was, "that while the ordinary criminal proceedings of the Sheriff Court, where a paid and professionally trained magistracy presides, are subject to review, the provisions of the Summary Procedure Act have practically made the proceedings of the unpaid and unskilled magistracy final and exempt from review in a large and important part of their jurisdiction." The Commissioners accordingly recommended that provision should be made for stating a case as is done under the English Summary Procedure Act, and in Scotland under the Revenue, Assessed Taxes, and Valuation Acts. Such a case may now be stated under the Act of 1875. It must state a point of law for the High Court. The appellant must either find caution or consign at the discretion of the inferior judge. The Act enables him to require the inferior judge to note objections to the admission of evidence, but not to note the evidence generally, as is required by the older forms. Hence it does not appear how the High Court, deciding on the admission or rejection of evidence, could at the same time ascertain its materiality with the view of setting aside or upholding a sentence; or whether, having decided the point of law, they could, under the power to remit conferred by the statute, give the inferior judge an opportunity of considering whether the point was or was not material to the judgment on which his sentence proceeded. This omission of the Act of 1875 is the more surprising that the obligation of a criminal judge or his clerk to take down the evidence is far more strongly based on the common law of criminal procedure than the obligation to take notes of objections. In fact, so strong was this obligation that it apparently required a provision in Sir William Rae's Act (sec. 17) to substitute the judge's notes for a complete record of the evidence.

The question may be put, What is summary business in Scotland? The answer is a little doubtful. There seems to be no definite or hard and fast line on one side of which it is invariably incompetent

to proceed without a jury. Of course in our settled practice the point is one of little practical interest. Serious cases are either tried in Justiciary, where there is no summary procedure, or by a sheriff with a jury. On the other hand, in the statutes creating a vast number of modern offences will be found directions with respect to the mode of trial which are decisive, *e.g.* a section incorporating the Summary Procedure Act, 1864, or a declaration that the offence is punishable on summary conviction, or that the penalties may be recovered in a summary manner, or by poinding, or distress and sale, or other summary process or diligence of the like nature. At least, wherever summary conviction under a statute may be followed by imprisonment or fine, or by an order to do some act and to be imprisoned in default of performance, it is clear from the 4th section of the Summary Procedure Act that its provisions may be applied. What may be called, however, the common law of summary conviction is contained in the four statutes, 9 Geo. IV. c. 29; 11 Geo. IV. and 1 Will. IV. c. 37; 7 Will. IV. and 1 Vict. c. 41; and 19 and 20 Vict. c. 68. These afford, at least, the outlines of a definition based not on the intrinsic character of the offence, but on the sentence or penalty inflicted by the judge of summary jurisdiction, or rather craved by the prosecutor. Thus (1) where the prosecutor concludes before the sheriff for a fine not exceeding £10 with expenses, or imprisonment not exceeding sixty days with caution for good behaviour, or to keep the peace for six months under a penalty not exceeding £20; (2) where the prosecutor concludes before the sheriff under the Small Debt Act for a statutory penalty not exceeding £8, 6s. 8d., exclusive of expenses; (3) where before magistrates of burghs, or justices of the peace, the prosecutor concludes for a fine not exceeding £5, exclusive of expenses, or imprisonment not exceeding thirty days with caution for good behaviour, or to keep the peace for a period not exceeding three months under a penalty not exceeding £10: in all these cases summary prosecution is competent either under the older statutes or under the Act of 1864. (See the commentary on sec. 3 of the Summary Procedure Act, in Moncreiff on Criminal Review, pp. 67-72.) The jurisdiction thus resting on what the prosecutor craves, the term of imprisonment or amount of penalty, it becomes of importance to inquire whether in all cases the prosecutor has an absolute discretion in fixing this. He appears to have a very large discretion. One would imagine that it was his duty in the public interest to ask for the maximum punishment or penalty; at least to do so formally or provisionally in his complaint. When the facts were proved, and the true nature of the offence committed authoritatively ascertained, one could better understand the discretion of a prosecutor being exercised to restrict the conclusions of his complaint. The expression constantly used in statutes, that the penalty is not to exceed a certain sum, is obviously intended to confer a discretion, not on

the prosecutor, but on the judge. If for the convenience of procedure it be in the power of a prosecutor to substitute the words "£5, or not exceeding £5," in all cases under a statute which says "not exceeding £15," it is clear that the statute is defeated, and that the criminal law will become a mass of inconsistency and confusion. The discretion of magistrates, which Parliament intended to define once for all over the whole country, will be enlarged or diminished from city to city, or county to county, according to the views of public expediency entertained by the local prosecutor. But it seems that, at least in a very large number of cases, the Court have held that this power belongs to the prosecutor. Thus in *Tague v. Smith* (5 Irv. 192), a prosecution under sec. 80 of the Poor Law Amendment Act, 1845, for deserting and neglecting to maintain wife and children, the statute authorized punishment by "fine or imprisonment, with or without hard labour, at the discretion of the Sheriff." The inspector of the poor, who is charged with such prosecutions, adopted the limits of fine and imprisonment mentioned in Sir William Rae's Act. There was a suspension brought of the conviction obtained, but it was refused. Lord Cowan said, "The 80th section of the Poor Law Act gives an absolute power of prosecuting complaints of this kind to the inspector of the poor of the parish. As he might certainly have abstained from bringing a complaint altogether, I do not think there can be any objection to his limiting the prayer for punishment." On this it may be said that the Poor Law Act does not seem to give any unusually absolute power to the inspector. It is no doubt his duty to prosecute wherever he thinks an offence has been committed, and no more can be said of any person charged with the prosecution of crime. But Lord Cowan's judgment suggests the principle that penalties may be modified for purposes of jurisdiction (the facts might disclose a very serious offence) only where the prosecutor has an absolute power to prosecute or not to prosecute; that is to say (for every prosecutor has a discretion in considering the facts), only where the prosecutor might without impropriety, or with impunity, refuse to prosecute in a case in which an offence had been undoubtedly committed. This principle, it may be assumed, would have no very extensive operation. In *Tague's* case the point was also taken that hard labour was not mentioned in the complaint, as it is in the statute. Here different views appear to have been taken by the judges. Lord Cowan repels the objection, because the section of the statute must have been before the Sheriff. This of course assumes that the Sheriff might have given hard labour, although the prosecutor did not ask for it, and seems to trench dangerously on the principle which founds jurisdiction on the amount of penalty craved. Lord Deas, on the other hand, with whom the Lord Justice-General concurred, thought that hard labour was an additional punishment, not a necessary part of the

statutory penalty, and might therefore be omitted from the complaint. The principle here is that the "necessary parts" of the penalty must all enter the complaint, but that the *amount* of maximum penalty in a statute is not a "necessary part" of the penalty. Who can decide, however, except the magistrate who convicts after hearing evidence, what is necessary and what is contingent in a statutory penalty? To decide such matters *ab ante* is a purely fanciful proceeding. Hard labour is often the very essence and justification of a sentence. Again, in *Tague's* case Lord Deas said that it would make no difference if the effect of taking proceedings in the summary form under Rae's Act were to exclude a right of appeal, otherwise competent, whether expressly given or not excluded by the special Act. This is rather strong, and it is apparently contradicted by the opinion of the Court in *Bute v. More* (1 Couper, 695), where it was held that a prosecution for profanation of the Sabbath was not well brought under the Summary Procedure Act, 1864, because that Act excluded review and the Scottish Acts relating to Sabbath profanation gave the right. Further, this case of *Bute v. More* itself lays down a most important limitation on the rule that a prosecutor can indiscriminately take summary proceedings, whatever the nature of the offence, by the simple process of altering the penalties authorized by Act of Parliament. The majority of the Court in that case said that the offence was a peculiar one, involving serious social consequences, and it was not right or competent to change the ordinary method of trial for one less deliberate and excluding review. The objection that the adoption of the Summary Procedure Act excludes review is now to a large extent, though not wholly, removed by the Summary Prosecutions Appeals Act, 1875. But with regard to the view that the character of the offence must regulate its mode of trial, this must be borne in mind that while such a view is perfectly just as against the power claimed by the prosecutor to vary procedure by reducing penalties, yet if the penalties mentioned in an Act of Parliament are adhered to by the prosecutor, you then have what is probably a very fair test of the gravity of the offence in the eyes of the Legislature, who, representing public opinion, and for the protection of the public, passed the statute.

In discussing the question whether inferior judges can try without jury, Baron Hume observes (i. 147), "As for the inferior judges, whose sentences of every sort are liable to review in various forms of process in the Court of Justiciary, and cannot lawfully be executed, so far as they are for corporal pains, till after allowance of a sufficient time to apply for redress, I say that with respect to them a far greater latitude of trying without the assistance of a jury has been established; though I shall not affirm that our practice has yet attained to that certainty and consistency in all the particulars which were to be wished in a matter of such importance." From the cases already cited it appears that our practice is not even yet in a perfectly

certain and consistent state. If indeed it could be held that under Rae's Act and the Summary Procedure Act, 1864, every complaint competently brought for certain penalties could, irrespectively of the nature of the offence, be tried in the manner provided by these Acts, this would establish a definite rule, and the only question remaining would be in what cases such a complaint could competently be brought. As we have seen, the nature of the offence might not merely suggest a certain procedure, but it might also affect the question whether a complaint had been competently brought for certain penalties so as *ex facie* to secure a summary trial. But if the true view of Rae's Act and its successor be this, that cases which in their own nature are fit for summary trial may be so tried in the manner directed by these Acts, provided the penalties competently craved do not extend beyond certain limits, then the practice is left very much where Baron Hume found it. It is noteworthy that he puts the practice of summary trial on the existence of a right of appeal, on the controlling power of a superior court. This was carefully preserved in the Act of Adjournal and Rae's Act. The learned author continues: "Thus far the rule does, however, appear to be settled, that an inferior judge, whether sheriff, justice of the peace, or magistrate of a burgh, may try without a jury on a libel concluding for fine and damages, or imprisonment only, or banishment forth of the burgh or county." This correctly represents the practice of the eighteenth century and of the first decade of the nineteenth century. But according to a series of cases, of which *M'Millan* (14th December 1818) was the first, and of which *Martin* (7th November 1827, *Syme's Cases*, No. 84), is one, this practice was condemned and reversed. The judgment of the High Court in *M'Millan's* case was, "In respect of the nature of the crime charged" (theft from dwelling-house aggravated by previous conviction), "find that the Sheriff, notwithstanding the usage alleged to have taken place, ought to have proceeded in this case with the assistance of a jury: therefore suspend." This indeed seems to have been a fixed style or form of decree, and with reference to the subsequent case of *Sharp v. M'Ewan* (22nd March 1826) Baron Hume adds the observation, "According to notes which I have seen of what passed at the advising, the Lords were all of opinion that the just criterion in this matter is the nature of the crime charged, and not the tenor or extent of the conclusions of the libel." As regards police offences in burghs, however, it appeared from an inquiry ordered by the Court in the case of *Young v. Wemyss* (1783) that it was the general usage of the royal burghs to try such cases and punish with fine and corporal pains without a jury. Hume says this sharp and summary coercion has been thought "material to the quiet of those places and the safety of their inhabitants, otherwise so much exposed to the evil practices of the many dissolute and profligate persons who have their haunt and resort in towns." It appears from the



report of *Young v. Wemyss* that even in what are called *leviora delicta*, viz. those not inferring death or demembration, the burghs were not unanimous, for Ayr always had jury trial; while the Sheriff Courts were not unanimous on the other side, as Midlothian never had jury trial in such cases. The decision in that case was based on practical convenience. "If the solemnity and detail of jury trial were to be extended to petty crimes, the same frequency of commission which demands a steady and uniform infliction of punishment would often render unavoidable the impunity of the offenders."<sup>1</sup> Even in the Burgh Courts, however, the distinction was carefully kept up between offences in their own nature different; for on the same date as *Young v. Wemyss* the High Court decided in *Brown* (a case of attempt to murder and masterful theft) that "jury trial was indispensable where the higher crimes are charged, though inferior punishments be libelled." Hume also observes that the practice of trial without jury had not extended to "crimes of a higher denomination, though prosecuted to the effect only of inflicting the like corporal pains of pillory or scourging." From M'Laurin's report of the leading case of *Pescatore*, which no doubt occurred thirteen years before *Young v. Wemyss* (M'Laurin, p. 722), it would appear that Hume had underrated the extent of the practice, and that it was common enough in 1770 for sheriffs and justices of the peace, as well as magistrates of burghs, to inflict sentences of banishment, imprisonment, whipping, and the pillory after trial without jury. This was attempted in *Pescatore's* case in the Sheriff Court of Midlothian, the charge being that *Pescatore* fired a pistol to the serious injury of the person; and the judgment of the High Court, finding that the libel ought to have been tried by a jury, is eulogized in the highest terms by M'Laurin, who says that while magistrates may properly have the power of fining and imprisoning for petty offences, yet "to allow justices of the peace to whip publicly without previous conviction by a jury is a gross violation of the right and security of the subject." It ought to be noted that in *Pescatore's* case the pursuer or prosecutor tried unsuccessfully to evade the judgment of the Court by restricting his libel to pecuniary reparation. It originally included whipping, pillory, and imprisonment. This case was followed by those of *Brown* (1783), *Ballantyne*, and *Johnstone* (1789) to the same effect. Hume in closing his chapter on this subject observes, "To some it has been a matter of regret that our practice is not arranged on one uniform plan for all the inferior judges for all cases (no matter what the style or description of the crime) where the panel on conviction may be liable to corporal pains." The power of fining

<sup>1</sup> A similar reason is given by Erskine (iv. 4, 93), who says that the "decision of slighter offences by jury was found burdensome to the country, both in point of expense and by the constant attendance of numbers of people at all seasons upon criminal courts, either as parties, witnesses, or jurors, to the great detriment of agriculture and manufactures."

without jury trial seems to have been conceded at an early date. It is a little remarkable that (Hutcheson, Justice of the Peace, i. 163) the earliest records speak of the assize being unknown at sessions. Erskine (iv. 4, 93) says that the Act 1617, c. 8, sec. 6, gives justices power to try small breaches of the peace without a jury, but this is not clear on the terms of the Act. The authority under which justices act in Scotland clearly contemplates their inflicting corporal pains, and in very serious cases. Lord Braxfield said he saw nothing in the constitution of sessions incompatible with a jury trial. It is true that, as Sir George Mackenzie says, they dealt only with "small matters;" but it is not so clear whether they did so because they could not get a jury for heavier cases, or whether their jury fell into disuse because it was so little required for "small matters." The former is the sounder line of argument. A claim was at one time made that the Scottish justices had the same criminal jurisdiction as those in England; but, as Hutcheson observes, "this cannot make them competent without a jury to the cognizance of any offence which by the immemorial practice of the country had required a jury trial." As matter of history the justices have only inquired into and certified, they have never judged, the most serious crimes; though to a certain extent they shared with the Sheriff and the Burgh Courts the loose practice which was stopped by the case of *Pescatore*.

It would appear, therefore, that the right to jury trial in the inferior courts is a subject not altogether free from doubt and difficulty.<sup>1</sup> There are perhaps other matters in our system of summary jurisdiction which require investigation. A great boon was no doubt conferred by the Act of 1875, which introduced a limited right of appeal to the procedure under the general Act of 1864. But it may be of interest to inquire how far Scotland already possesses, or if she possesses to any extent, the benefits which were given to England in Sir Richard Cross's Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49). This Act is understood to meet the views of the trade-unions, who were practically interested in carrying it. Mr. Hopwood had prepared a bill in their interests, and during the passage of the Government Bill through the House he had an interview with the Government draughtsman, Sir Henry Thring, with the result that some of the ideas of the trade-unions were adopted. They of course wished to raise in addition the important question of the qualification of justices and the mode of their appointment, and the provision of legal chairmen for quarter sessions; and they also wished facilities

<sup>1</sup> Lord Kilkerran said (Tit. Delinquency, No. 15), "There is no point less fixed than this, when a trial was to be by jury and when not." The test proposed by Erskine (*loc. cit.*), that a jury is not required where the fact is provable by the oath of the party, would, according to the apparent tenor of the authorities cited by him (*Stewart* in 1622 and *Tait* in 1634, M. 7299-7300), confine summary procedure to the case of pecuniary "unlaws" or "bloodwits."

given for the appointment of stipendiary magistrates. These matters have not been dealt with. The remaining points were—

“1. To give the right of appeal in every case where imprisonment is inflicted without the option of fine. 2. To give the right to the accused where the justices had power by law to inflict three months' imprisonment, to demand trial by jury. 3. To improve the procedure on appeal. 4. To diminish the too great frequency of imprisonment by allowing the convicted to pay their fines by instalments. 5. To give power to justices to fine instead of committing to prison where they had not the alternative previously. 6. To enable justices to exercise clemency by discharging, even after conviction, if punishment appeared unnecessary. 7. To provide for the taking of recognisances out of court, so as to prevent unnecessary detention and imprisonment of defendants. 8. To abolish payment of court fees and require that justices' clerks should be paid by salary. 9. To forbid cumulative sentences exceeding six months. 10. To enable justices to inquire as to persons committed for default of sureties, and release them.”

Some of these points have been settled in the Summary Jurisdiction Act, for which the Parliamentary Committee of the Trades-Union Congress last year took credit as an achievement of its own. Whoever is actually entitled to the credit, the Act may therefore be regarded as having corrected some injustices, or at least having satisfied some actual grievances, which cannot always be said of measures of law reform.

The first provision of the Summary Jurisdiction Act is to give a general power to justices to reduce the punishments which they are authorized to impose; *i.e.* to reduce the prescribed amount of a fine or the prescribed term of imprisonment, and to exclude hard labour from a sentence of imprisonment, to dispense with recognisances, and finding sureties to keep the peace. Further, where the Court has authority to impose imprisonment only, they may now impose a fine not exceeding £25. This is the substance of sec. 4, and it will be seen that it applies mainly, not to the common case where a discretion is given to fine or imprison within a maximum limit, but where specific penalties are imposed by statute. The common law of Scotland, so far as it is recorded, seems to give no power to modify the amount of a penalty fixed by statute. The conviction must be in terms of the statute, including the amount of the penalty. Indeed, as the question seems scarcely to have arisen, the probability is that in the great majority of local statutes, as well as in what may be called special general statutes, the common-sense course of only prescribing a maximum limit has been followed. This is the case with the Factory and Education Acts, and most other Acts under which it must be expected that the complexion of individual cases will vary very much. In other cases where the same necessity for a discretion does not exist, *e.g.* in cases of breach of public-house certificates, the same course

has been wisely followed. As regards the case of police offences in which fine or imprisonment is authorized, but nothing is expressed or implied with reference to the powers of the judge in relation to the punishment of such offences, it is provided generally by the 29th section of the Summary Procedure Act, 1864, that the power shall be to impose a penalty not exceeding £5, or a sentence of imprisonment not exceeding sixty days, and to find caution to keep the peace for six months under a penalty of £10, and in default of caution imprisonment not exceeding thirty days. The only case which can be cited as properly stating the Scottish law on this matter does not relate to the reduction of fine or imprisonment, but to the third matter mentioned in the 4th section of the Summary Jurisdiction Act—the exclusion of hard labour. In *Ferguson v. Thow* (4 Irv. 196), a case under the old Master and Servant Act, 4 Geo. IV. c. 34, which specifies imprisonment with hard labour for a reasonable time not exceeding three months, a conviction imposing only fourteen days' imprisonment was set aside, the servant complaining that he had not been sufficiently, or rather legally, punished. The Lord Justice-General said, "It was the duty of the justices to walk according to the statute, which imposes one kind of punishment and does not leave it open to them to dispense with the hard labour." Lord Neaves, it is true, started a theory on the subject which might prevent the case from being regarded as a general authority on the constructive powers of magistrates administering criminal statutes expressed in similar terms. He said the Act had in view the benefit of working men, to whom it was important that imprisonment should be short, but also that their habits of industry and bodily health should be kept up. "If that provision were alternative, there would be a temptation to justices to dilute the character of the imprisonment by omitting the hard labour and extending the term of imprisonment." Probably, however, the grounds on which this theory proceeds, viz. that short sentences are desirable and so is bodily strength, would apply to many other classes besides working men, and therefore the case may be accepted as a general authority. Again, in *Gardner v. Dymock* (5 Irv. 13), a case under the Edinburgh Slaughter-Houses Act, 1850, and prosecuted under the Summary Procedure Act, 1864, a conviction merely declaring the contravention, and not proceeding, as the Act directs, to impose a penalty not exceeding £20, was set aside as not conform to the statute. Of course the omission to punish by way of fine to any amount (even where a discretion is given to vary the amount) is perhaps a graver deviation from a statute than the mere reduction of the pecuniary amount of fine (where that is fixed by statute), but, on the general principle stated, it would be impossible to take a distinction between two such cases. A point was raised on the construction of the Slaughter-Houses Act, that the magistrate had some discretion with reference to the penalty;

but if there was any doubt on this point, it must have been removed by the fact of the procedure having been taken under the Summary Procedure Act, 1864, which provides only one form of conviction for the case. Lord Cowan distinguishes a statutory from a public prosecution, and says, "If he thought there should be no penalty at all, what right had he to convict?" So Lord Neaves says, "It is the duty of every judge, when a contravention of the law is proved, to which a penalty is attached, to adjudge that penalty, whether in whole or in part, under the power of modification committed to him. Judges have no power to pardon crimes the commission of which they have recorded." And he dwells on the fact that a conviction and sentence form one act of a summary court, and are not separate, as in the case of verdict and sentence in a superior court. Lord Jerviswoode's opinion is to the same effect, but based largely on the language of the Summary Procedure Act; and the Lord Justice-Clerk (Inglis) gives the majority of the Court the benefit of his weighty concurrence, adding, however, a new ground, that the justice of peace is bound by his oath of office to bring in to the Queen all penalties not otherwise directed to be disposed of. Perhaps, however, this assumes that the penalty is rightly imposed by the magistrate. On the other hand, Lord Deas and Lord Ardmillan enter a vigorous dissent. Lord Deas says, "He might have reduced the penalty to a shilling or a farthing, and I should hesitate to say that he might not dispense with it altogether." And he refers to the frequent practice of magistrates admonishing without punishing in any other form, but he does not refer to any case in which an admonition was administered on conviction under a statute specifying a pecuniary penalty. His opinion to a large extent proceeds on the assumption, not assented to, apparently, by the majority of the Court, that even in summary procedure the prosecutor might refrain entirely from moving for sentence. It is not clear, however, that this could be done, unless he also refrained from moving for conviction. "If we were here dealing with the general question, whether it is a good objection to a conviction that there is no sentence, I should think it a very serious thing to say that a judge or magistrate can never dispense with inflicting punishment." But it is clear that this is a much wider question than that of the magistrate's power to dispense under a statutory prosecution. Lord Ardmillan also considers the question with reference to the general law and practice of Scotland, and says, "A statutory liability to penalty" (there being no express direction to impose the penalty) "does not necessarily imply that the penalty must be invariably awarded by the judge in every case of conviction. There may be circumstances, such as a popular error—*communis error*—in the construction of a new statute, or the carelessness of the servant of an absent or innocent master, which might induce a magistrate to refrain from awarding any penalty, even



when he could not on the facts proved in evidence avoid convicting of the contravention. The law must trust something to the discretion of the magistrate." Some of the cases suggested by Lord Ardmillan might perhaps go to a finding of not guilty; as, for example, where they excluded the possibility of a *mens rea*, or guilty intention, which is essential to the commission even of a statutory offence. It must be said that it is difficult to distinguish for practical purposes the power to reduce a fine to a purely nominal amount and the power to dispense with it altogether. The case of a statutory fine introduces a new class of consideration, for the statute, *ex facie*, excludes the discretion of the magistrate; but if at common law the magistrate might dispense where he had discretion (a discretion which must be guided by, or at least must not outrage, the contemporary practice of the Courts), it might be suggested that he had power at least to modify in exceptional cases where the statute indicated an amount to regulate the fine in the ordinary case.

Practically the question of the power of the magistrate to modify penalties, or at least to substitute fine for imprisonment, becomes less important in Scotland, if it be the case that the prosecutor has power to select from alternative penalties imposed by a statute, and to reduce the maximum penalty. This power was before glanced at in connection with the question of jurisdiction. It seemed to be the result of the authorities that while summary proceedings might in this way be rendered competent where the offence was not one properly triable by jury, it was impossible by the manipulation of a complaint to deprive anybody of his legal right to a jury trial. No doubt this power does not affect the class of cases to which, in the first place, the 4th section of the Summary Jurisdiction Act applies, viz. cases in which the amount of penalty is fixed by statute. But if the Legislature is inclined to trust the public prosecutor (an institution scarcely yet acclimatized in England) with this unusual discretion, very possibly this may have led, and may lead, to the less frequent definition of penalty by statute; and as regards the choice of penalty also, the discretion of the prosecutor may have been relied on in place of the discretion of the magistrate. In England the law of summary procedure is of course based on the assumption of a private prosecution; and no trace occurs in the classical authority (Paley on Summary Conviction, sixth edition, 1879) of a power in the prosecutor to restrict the pains of law. It is perhaps desirable to consider more closely the extent to which such a power has been recognised in Scotland.

The question was raised in the case of *Russell*, February 1827, which is reported in a footnote to Hume, ii. 60. The case was under the Night-Poaching Act (57 Geo. III. c. 90), which clearly contemplates the punishment of transportation, although it contains words which, it might be argued, would cover a milder punishment. A libel in the Sheriff Court, craving in general terms the penalties

of the statute, was found by the High Court to be incompetent, but the question was reserved whether it would have been competent to conclude specially for such pains as might be inflicted in the Sheriff Court. In the previous year occurred the case of *Sharp* or *M'Ewan* already referred to, reported in Shaw, 152. The charge was theft of a considerable sum of money from the person, and concluded for fine, imprisonment, and banishment. The Court, in suspending the sentence on the ground that the Sheriff ought to have proceeded with a jury, admit that the decisions have not been consistent, but they all denounce the principle that the form of trial should be regulated by the conclusions of the libel. They dissent from the doctrine of Hume on that subject. Apart from the effect upon jurisdiction, Lord Gillies says that the practice of limiting conclusions in inferior Courts is erroneous, but Lord Pitmilley, while agreeing that it is objectionable, "dares not say that it is illegal." In *Hood v. Young* (1 Irv. 236) the prosecutor of a common-law offence proceeded under Rae's Act, but asked merely for imprisonment. The judges were apparently in some perplexity. The Lord Justice-Clerk (Hope) said, "The great difficulty I have is in saying that the prosecutor has the power to limit the judge in regard to the nature of the punishment. The complaint should undoubtedly have put the alternative within the power of the Sheriff, and the Sheriff might have refused to proceed on a complaint of this character." This observation is accentuated by the fact that in *Hood's* case the Sheriff awarded a fine, and it was the unanimous opinion of the Court that a fine could not be awarded on a complaint craving only for imprisonment. If the Sheriff is bound strictly by the terms of the complaint, as no doubt he must be if the accused is to have fair notice of the proceedings, the power of the prosecutor to adjust the complaint becomes still more important. But if the observation be sound with regard to the alternatives of fine and imprisonment, may it not be extended to the amount of either fine or imprisonment which is permitted by a statute? The doubts expressed in *Hood v. Young* are fully justified by the case of *Chisholm v. Black* (2 Couper, 49). Here it appeared that the Mussel Fisheries Act, 1847, authorized a sentence of imprisonment only, while a complaint brought under that Act and Rae's Act craved certain penalties, none of which was imprisonment only, none of which therefore was wholly competent, though one was partly competent, under the special Act. The Court, with doubts expressed by Lord Cowan, sustained a sentence of imprisonment on such a complaint. Lord Ardmillan entirely concurs with the view that the prosecutor is bound to lay alternative penalties before the Court, but is equally clear that mere *pluris petitio* should not render void a sentence which is within the statute. On the power of restriction he says, "I have no doubt it is in the power of the public pro-

secutor in a case where there is no statutory fixing of punishment so high as to exclude summary jurisdiction, or on the other hand no settled common-law recognition of punishment as appropriate, to present a case for the necessary jurisdiction of the Sheriff by restricting his demand under the Act of 9 Geo. IV. c. 29." But from this rule he excludes the case where the statute fixes the period of punishment.

(To be continued.)

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## Obituary.

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WILLIAM FREDERICK HUNTER died at Madeira on the 28th April at the age of thirty-nine. It is with great regret that we chronicle this death. This was a man beloved by the whole Scottish bar for his personal qualities and for his many accomplishments. It is very hard to part with him, and we must now only notice a few points in his character and his career.

He was the son of a country gentleman in Argyleshire who owned the estate of Hafton; he was educated at the University of Edinburgh, and from thence went to Heidelberg, and afterwards to Berlin. He became a *Doctor utriusque Juris* of the University of Berlin, and he afterwards was called to the English bar.

He did not intend to practise at the English bar, and in becoming a member of it he wanted simply to obtain as wide a knowledge of his profession as such an education could afford him. His object was to make the profession of an advocate at the Scottish bar the business of his life; and when he succeeded, on the death of his brother, to the estate of Hafton, he adhered to this resolution. Not that he had any disinclination to the life of a country gentleman, but because he loved the active exercise of his profession as an agreeable intellectual pursuit.

He was a man accomplished in many various ways. He was acquainted with the literature of Germany, and he knew more particularly the import of the German legal literature of the Fatherland. In recent times the study of the civil and the canon law has in that country received a very great impetus, and he showed that he entirely understood and appreciated the movement, by an article which he wrote in the current publication of the "Encyclopædia Britannica." This article, "Canon Law," is the most correct and the most exhaustive historical account of the canon law that exists in any language. Every date in it can be relied upon as thoroughly as if it had been stated by Dr. M'Crie or Lord Hailes. The only defect in the article is that the writer does

not give an epitome of the canon law, which has been so often misconstrued and maligned; his excuse being, however, that he was confined to space, and was obliged to limit his article simply to the history.

Had Mr. Hunter lived, there can be little doubt that he would have taken a high position amongst his fellow-members at the bar. He was a genial, honourable, modest, learned man. It is a grievous hardship to lose such a cultivated person. We had occasion to make the same lament over the death of Francis Deas, a man of equal cultivation, and who also was cut off in the full maturity of his powers.

Mr. Hunter was in the full vigour of health at the end of March 1878. On the 30th of that month he stood upon the hillside of his estate of Hafton bareheaded, at a ceremonial for the opening of a new reservoir at Sandbank upon his estate; and on that occasion made a speech with a north-east wind blowing. The result was that upon that night his lungs were affected, and the cough that he then indicated never left him. He struggled hard against it. He voyaged to the Cape and to Melbourne in the hope that the sea voyages would do him good. At last he resorted to Madeira, where the end came.

MR. SAMUEL ADAMSON.—The decease of Mr. Samuel Adamson of Drumclyer, which took place on the 24th May at his residence, Terraughty, calls for something more than the customary intimation. Mr. Adamson was a native of Dumfries, and during the too brief span of his mortal life—forty-nine years—became well known, and much beloved, not only in the county of Dumfries, but also throughout the stewartry of Kirkcudbright. He was educated in Dumfries, at the Wallace Hall Academy, and in Edinburgh. Choosing the law as his profession, he succeeded his father (the late Robert Adamson) in the business at Dumfries, which included the agency for the British Linen Company's Bank, the treasurership of the Crichton Institute, besides the legal management of many of the landed properties in the counties of Dumfries and Kirkcudbright. He was a stanch Conservative and Churchman, and both those interests in that neighbourhood will long have cause to mourn his loss. He was remarkable for his great business capacity, for his sterling regard for truth and rectitude, and an utter contempt for all cant and hypocrisy. These are qualities which never fail to beget esteem, and in the case of Mr. Adamson such feelings only were entertained towards him by all who had the privilege of his acquaintance. He is survived by his widow—a daughter of the late Mr. M'Turk Gibson—by one son, who succeeds to the paternal property, and four daughters. Mr. Adamson's illness was of a lingering and painful character, but was borne with Christian fortitude and resignation.

## The Month.

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*Parliamentary Oaths—The Bradlaugh Case.*—The construction of the Parliamentary Oaths Act, 1866, recently came before the House of Commons in connection with the case of Mr. Bradlaugh, the member for Northampton, who objected to taking the usual oath, and claimed to make an affirmation instead. As every reader of the newspapers knows, the question of his right to do so was referred to a Select Committee of the House of Commons, who by the casting vote of the chairman decided that persons in the position of Mr. Bradlaugh were not entitled to make an affirmation instead of taking the oath. Most people have read in the newspapers something or other about the claim which was made and about its rejection, but few know, and indeed from not having access to, or not troubling themselves to consult, the statutes, few people have had or have cared to take the opportunity of knowing, the real merits of the case. When explained, the question appears plain and simple enough.

The Acts now in force upon the subject are the Parliamentary Oaths Act, 1866 (29 and 30 Vict. c. 19), and the Act 31 and 32 Vict. c. 72, which *inter alia* amends it. The Act of 1866 provided a new, briefer, and simpler form of oath (for which even a simpler form is substituted by the amending Act). As there were classes of persons who on account of their religious scruples had been permitted by law to make an affirmation instead of taking an oath—persons in whose case an affirmation and not an oath was the usual and appropriate form of attestation—a new and simpler form of affirmation, corresponding to the new and simpler form of oath, required to be introduced. This was done by section 4 of the Act of 1866, which enacts that “every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may, instead of taking the oath hereby appointed, make a solemn affirmation in the form of the oath hereby appointed, substituting the words ‘solemnly, sincerely, and truly declare’ for the word ‘swear,’ and omitting the words ‘so help me God.’”

Section 4, it will thus be seen, is merely executive. It does not enlarge, and was not intended to enlarge, the class of persons entitled to make an affirmation. Quakers and the other classes of persons who, independently of the Act, are entitled to make an affirmation instead of taking an oath, make it in the new form instead of in the old one—that is all.

Who are the persons who are “by law permitted to make a solemn affirmation or declaration instead of taking an oath”? These are—Quakers and Moravians (3 and 4 Will. IV. c. 49); persons who



have ceased to be Quakers or Moravians, but who still retain conscientious objections to taking an oath (1 and 2 Vict. c. 77); and Separatists (3 and 4 Will. IV. c. 82). In the first of these Acts the affirmation is permitted to be made "in all places and for all purposes whatsoever, wherever an oath is or shall be required either by the common law or by any Act of Parliament." The second Act gives precisely the same privileges to those who have ceased to be Quakers or Moravians as they would have had if they had not ceased to be so. The provisions of the third Act are made applicable to every person "who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required."

Mr. Bradlaugh does not come under any of these three classes; but he argued that he still came under the description in the Parliamentary Oaths Act of persons "by law permitted to make an affirmation instead of taking an oath," because under the Evidence Acts he is permitted to give evidence, and had actually given evidence, in a court of law without taking the oath, but simply on making an affirmation. The Evidence Amendment Act, 1869 (which by the way does not extend to Scotland), provides that if any person called to give evidence in any court of justice "shall object to take an oath, or be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect upon his conscience, make the following promise and declaration: 'I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.'"

This Act, it will be observed, has to do with the taking of evidence, and with that alone. The permission of law to substitute an affirmation for an oath referred to in the Parliamentary Oaths Act must on any fair construction be held to mean a permission in regard to the matter with which the Act was dealing, viz. Parliamentary oaths. Mr. Bradlaugh's argument is a mere quibble. The middle term, to use the language of logicians, "persons by law permitted to make an affirmation," etc., is understood in a different sense in the two premises. In the major premise the expression "persons 'by law permitted to make an affirmation instead of an oath,'" taken from the Parliamentary Oaths Act, means persons in the same category as Quakers—Moravians and Separatists, for example—persons who have had the right conferred upon them of substituting an affirmation for an oath upon all occasions—in whose case an affirmation and not an oath is the appropriate form of attestation. In the minor premise the expression "person 'by law permitted to make an affirmation instead of taking an oath'" is used with a *secundum quid*. It means a person in whose case a dispensation from the forms of law is made by a special Act (the Evidence Amendment Act), in a particular exigency, for a particular purpose, and when these persons appear in a particular character,

namely, for the purpose of obtaining evidence, and when they appear as witnesses in certain courts; and upon a certain condition, to wit, that the judge shall be satisfied that an oath would have no binding effect on his conscience.

We have already shown for what purpose and with what object in view the Act was passed. Its purpose and object forbid the idea that it was intended to extend a partial exemption, an exemption operating on particular occasions and in certain exigencies and after fulfilling a certain condition, into a general exemption.

Further, in order to bring a person under the description of "persons 'by law permitted to make an affirmation,'" etc., even for the limited purposes of the Evidence Acts, a condition must be fulfilled, viz. that the presiding judge shall be satisfied that an oath would have no binding effect upon the person's conscience. But one judge might be satisfied of this and another judge might not. It is clear from this that the exemption claimed under the Evidence Acts is not a general exemption even as to the giving of evidence. It is an exemption only for the purposes of a particular trial. Again, suppose that a person, Mr. Bradlaugh for instance, had never been in a court of justice at all, how could he be said to have purified the condition of satisfying the presiding judge that an oath would have no binding effect upon his conscience—a condition essential to his being considered in any sense or to any effect one of the "persons permitted by law to make an affirmation instead of taking an oath"? To look at the matter in a broader light, it is clear that the class of persons referred to in the Parliamentary Oaths Act and the class of persons referred to in the Evidence Act are entirely different. They differ *toto cælo*. The former are persons whose conscience is so tender that it scruples at and shrinks from taking an oath. The latter are persons whose conscience is so free from tenderness that an oath would have no binding effect upon it.

The difficulty we have had about this matter is to understand how there was any difficulty about the matter. But a greater difficulty remains, and that is to account for the fact that the view we have stated was carried only by the casting vote of the chairman, Mr. Walpole; and that the minority included several lawyers of repute, and even of eminence—the Attorney-General, the Solicitor-General, Mr. Watkin Williams, Serjeant Simon. It may be that this is just another illustration of the evils attendant on the practice of heaping too much work on certain members of the legal profession. Take any four or five briefless juniors who would have had time to read up and consider the statutes; it is hardly likely that they would have gone so egregiously wrong. But if this is not the true explanation, and the decision of the minority is to be regarded as a fair specimen of the intelligence of the lawyers who were in the minority, it makes one think with no great

admiration of the present state of the English bar when some who have attained the highest position there cannot see their way through a simple question like this; and it makes us long for the day, sometimes threatened by some of the "improvement" gentlemen, when the Scottish courts and the Scottish bar shall be transferred to Westminster. Evidently Westminster Hall would be nothing the worse of the infusion of a little Scottish blood. It has been hinted in quarters by no means unfriendly to the minority that the vote of the Select Committee was almost entirely of a party character. If this were true, it does not improve the case of those legal gentlemen who formed part of the minority. To be acquitted of want of intelligence on the plea of want of honesty is not an enviable fortune for a public man.

The Committee having rejected Mr. Bradlaugh's claim to make an affirmation on the ground that it was not enough that he had been permitted to make an affirmation in a court of justice, the judge being satisfied that an oath would have no binding effect on his conscience, Mr. Bradlaugh has claimed to be allowed to take an oath, and the next subject for consideration is whether such a person is entitled to do so. The Prime Minister has said that the question is of a judicial character. Be it so: we know how a judge would settle it. He would say that the forms and solemnities of the court must be respected, and at least that they must not be openly derided and defied. He would hold that to permit a person to take an oath after a serious inquiry had been made into the effect to be given to the circumstance put forward by himself that an oath had no binding effect upon his conscience, would be to frustrate the very object to secure which oaths are intended, and to overturn the very principle which justifies their existence. It is because it has been thought an almost incredible thing that a man should take a certain name in vain that the solemn sanction of an oath has been imposed, and if a man is allowed to take that name avowedly in vain, the value of the oath and indeed its *raison d'être* perish. Indeed, considerations of this kind were among the reasons which led to the alteration in the law made by the provision in the Evidence Act to which we have referred.

It cannot be denied that the ground, the ultimate ground on which Mr. Bradlaugh's contention that he should be permitted to make an affirmation was based, was that an oath would have no binding effect on his conscience. On the 4th of May the Speaker acquainted the House of Commons that Mr. Bradlaugh claimed to make an affirmation instead of the oath; and that he founded this claim on the 4th section of the Parliamentary Oaths Act, and the Evidence Acts. The permission given in these Evidence Acts depends on the judge being satisfied that the oath would have no binding effect. It was to consider the effect to be given to this circumstance that the Select Committee was appointed; without this Mr. Bradlaugh would have had nothing to found his claim

upon, and the Committee would have had nothing to consider. The House of Commons, then, has official knowledge of the fact that according to Mr. Bradlaugh's own statement an oath would have no binding effect on his conscience. Besides, the fact has been brought to the knowledge of the members of the House by the manifestoes which Mr. Bradlaugh has promulgated in reference to the question before the House. After the Select Committee returned its report, and when the House had to consider what was next to be done, in his letter of May 20th he states, for the information of everybody, that the words which others regard as an appeal to the Deity are "sounds conveying to him no clear or definite meaning," and that the oath is "an idle form." The House, with the aid of a Select Committee, has to decide whether it should allow an oath, the reason for imposing which is that it is supposed to have a superior effect in binding the conscience, to be taken by a man who informs the House that it has no effect in binding his conscience at all, and to permit words, the reason for using which is that they are words of a very solemn import, to be used on the expressly stipulated condition that they are to be regarded as sounds conveying no clear or definite meaning. A quibbling attempt has been made by Mr. Bradlaugh to get over the self-created difficulty by saying that if he took the oath, the words would be binding on his honour and conscience. Not, however, *as an oath*, and an oath must be taken as an oath or not at all. It has been decided that he is not entitled to make an affirmation; and if he is not entitled to make an affirmation in the form of an affirmation, much less is he entitled to make it in the form of an oath.

What result, it may be asked, happens when a member does not take the oath? The answer to this depends upon what the member does. According to section 6 of the Parliamentary Oaths Act, 1866, a member of the House of Commons who votes or sits without having taken the oath is liable in a penalty of £500, and, in addition, his seat becomes vacated in the same manner as if he were dead. But if he neither sits nor votes, he retains his seat. This was the state of the law, at least in regard to the Oath of Abjuration, even before the Act of 1866. Baron Lionel Nathan de Rothschild, who refused to take the oath when it contained the words "on the true faith of a Christian," more than once accepted the Chiltern Hundreds in order to give his constituents an opportunity, by re-electing him, of protesting against what they considered the injustice of the existing law; which it would not have been necessary for him to have done if his seat had become vacant by his mere refusal to take the oath.

*Inequality of Sentences.*—The public must be greatly exercised, as indeed they are, and we do not wonder at it, when they see sometimes a very slight and at other times a very severe sentence inflicted for what to all appearance is an offence of the same kind

and of the same degree of gravity. The censure which the lay mind pronounces, when such contrasts are brought before it, is not unfrequently an unjust one, induced by ignorance of or inattention to the varying circumstances which discriminate one case from another. But it must be confessed that there are many instances of inequality of sentences which cannot be accounted for except on the rather unsatisfactory ground—unsatisfactory as regards the interests of public justice—that one judge has one view of the heinousness of a crime and another judge has a different one. *Tot homines, tot sententiæ*. A story is told in Whately's Rhetoric of an eminent counsel who said that he had often lost a case where he was right, but on the other hand he had often gained a case where he was wrong; so that it came to the same thing in the end. On the same principle it may be said, that if one prisoner receives too slight a punishment, this is made up for by the fact that some other prisoner receives one that is too severe; so that taking it through the piece, and striking the average of punishments, you find that justice has been done after all. This, however, must be very poor consolation for the culprit at whose expense the average of equity has been maintained.

Two cases, in which the offence charged was personation at a Parliamentary election, tried in the end of April last—one in the Sheriff Court of Glasgow, the other in the Central Criminal Court of London—illustrate the unequal incidence of justice more notably than any cases we have seen for a considerable time. In the Sheriff Court of Glasgow on the 30th of April a man who pleaded guilty to personation was sentenced to eight months' imprisonment with hard labour. On the previous day two men were sentenced in the Central Criminal Court for the same offence of personation at a Parliamentary election. The first was sentenced to three days' imprisonment with hard labour, the result of which, says the *Times* report, was that he was immediately discharged. The other was ordered to give two sureties of £25 and to enter into his own recognizances of £50 to come up for sentence whenever he was called upon so to do; that is to say, he was let off without any punishment at all except the fright. Perhaps Mr. Baron Pollock, the judge who gave these lenient sentences, had some compunction in awarding the only punishment he could legally inflict under the statute in that case provided, viz. imprisonment *together with hard labour*. If he had given imprisonment without hard labour, the sentence would have been illegal (*Ferguson v. Thow*, June 30, 1862, 4 Irv. 196). We think this is a mistake in the Act, and that the judge should have it in his option to award or withhold the aggravated punishment of hard labour according to the circumstances of the case. If the sentences in the Central Criminal Court seem to err on the side of leniency, certainly this defect has been amply made up for by the sentence in the Glasgow Sheriff Court. Eight months' imprisonment with hard labour for an



offence which has not yet become so common that stern measures are required for its repression, and which entailed no great damage to society (for what is the loss of one vote when thirty or forty thousand people are voting?), is surely a more than adequate punishment. Some time ago a man was tried before Lord Young in the High Court of Justiciary for stabbing another man in the throat so severely that he bled to death in a minute or two. He pleaded guilty to culpable homicide, and he was sentenced to eight months' imprisonment *without* hard labour. Have we got to be such a political people that it is worse to take away a man's vote than to take away his life? It will be remembered also that in the beginning of last year the City of Glasgow Bank directors received a similar sentence of eight months' imprisonment *without* hard labour.

The moral to be drawn by the judicious criminal from these cases is that if one wishes to indulge in the rather genteel and fancy crime of personation at an election—if he wishes to become a personator *in petto*, a twopenny Tichborne, he should be careful in selecting his sphere of activity. We should advise the Glasgow personator to change his *venue*. For purposes of personation London is a much safer place than Glasgow, and a Baron of the Exchequer is a much nicer gentleman to be tried before than a Sheriff-Substitute.

In these cases of personation in the Central Criminal Court, Mr. Baron Pollock, as we have seen, inflicted no punishment at all. The Act under which the men were tried empowers the judge to impose a sentence of imprisonment with hard labour for a period not exceeding two years. There is evidently a discrepancy of opinion here. The Legislature thinks the offence a serious one, and the judge does not. It may be that the Legislature has erred in making it imperative to couple the imprisonment with hard labour; but that is a matter with which the judge has no concern. It is his duty to carry out the intention and implied injunction of the Legislature; and we cannot see that he is doing so when he makes it a rule, apparently, to let the culprit off scot-free. That looks remarkably like snapping his fingers in the face of the Legislature.

At present there seems a tendency on the part of the judicial pendulum to swing round violently from one extreme to the other, from a "whacking" sentence to no sentence at all. An amusing case of the latter kind—amusing on account of the reasons assigned by the learned Sheriff-Substitute for his judgment—occurred at Peebles lately. A man was tried for assault committed by throwing mud at, and on, a voter going to the poll. The judge held the charge proven and discharged the offender without any punishment. The assault was committed on an election day when there was a good deal of excitement—a circumstance that might well have been taken into account in mitigating the penalty and

in choosing the kind of penalty. The reasons assigned for inflicting no penalty were droll. The act, it was said, was done probably more to indicate contempt than from any other motive. But the throwing of mud at a respectable man is not a legitimate way of indicating contempt. "It wants finish," and it is usually contemned by judges in as practical a way as the contempt is expressed. Next, we are told that the conduct of the accused was more like that of a tramp than that of a person of the accused's respectable appearance and position. If a tramp had been tried for indicating his contempt in the same fashion, we doubt whether he would have been let off without anything being inflicted on him except a lot of twaddle. If a man in a respectable position, and who ought to know better than a tramp, is let off without punishment, a tramp ought to be let off with less than no punishment—he should be rewarded. If the next tramp who is convicted of assault at Peebles does not get half-a-crown "to drink your honour's health, sir," we think the tramp has a right to complain of being unfairly treated. Even more curious was the statement that the fact of the panel appearing at the bar, coupled with the circumstance that his conduct met with the disapprobation of every respectable person, was a sufficient punishment. What, then, is the use of having courts and sheriffs and all the paraphernalia of justice? Why saddle the country with the salary of a Sheriff-Substitute when his work can be done without money and without price by the disapprobation of every respectable person? This is the newest substitute we have heard of for the ordinary means of administering justice. The late Mr. Alfred Smee invented a machine by employing which you could, so the inventor said, solve the most knotty points of law with unerring accuracy. This Laputan invention has not as yet superseded the judicature of the country; and before recommending its general adoption we should like to put in half-a-dozen of the recent English cases about divorce and domicile at one end of the machine and see what comes out of it at the other. During the Indian Mutiny the President of the Board of Control was blamed for sending out troops by sailing vessels instead of by steamers. He justified himself on the ground that his plan stimulated a spirit of emulation among the competing vessels, which had the effect of causing them to make extra quick passages. A good deal of ridicule was thrown at the time on the idea of finding in the spirit of emulation which existed among sailing vessels a motive power superior to steam. But all these suggestions of genius are beaten hollow by the Peebles plan of utilizing the currents of opinion, and making them move the judicial windmill—of finding in the "disapprobation of every respectable person" a substitute for the Substitute.

It has been proposed by some lawyers, whose experience entitles their suggestions to attention, that counsel on both sides should be heard on the question of the amount of punishment to be inflicted

on the prisoner, as well as on the question of his guilt or innocence. The former is a question of secondary importance to the latter, but it is secondary to it alone; nay, in some cases we doubt whether it is of secondary importance. Under our present system the amount of punishment is wholly in the hands of the judge, unless of course in the case of crimes where a limit is imposed by statute. It may be said that counsel would have nothing to found upon, would have no precedents to cite, and would be unable to refer to any general principles that had been laid down. We think it would be a pity if there ever did come to be a body of precedents which should have the effect, which precedents are apt to have, of fettering and hampering the discretion of the judge in such a matter as the determining the amount of punishment. But though there were no precedents to be cited, there would be considerations to be stated and to be weighed. In a brief time there would be general principles laid down for meting out punishments, and there would be accumulated a body of decisions which could be referred to, not as binding precedents, but as aids and guides to the judge in arriving at a right decision. In this way punishments might become more uniform, and the scandal of the inequality of sentences, which not unfrequently obtrudes itself upon the public attention at present, would die away.

*Installation of the Sheriff of Perthshire.*—On Tuesday, April 27, Mr. J. H. A. Macdonald, Advocate, lately Solicitor-General, was installed as Sheriff of Perthshire, in room of Sheriff Lee elevated to the bench. The ceremony took place in the Justiciary Court-Room, and there was a large attendance of the members of the Bar and the general public, amongst whom were several ladies.

The Sheriff's commission having been presented and read, the appointments of Mr. H. H. Norie, Mr. Robert Martin, and Mr. C. G. Sidey as Honorary Sheriff-Substitutes were confirmed. In suggesting the re-appointment of Mr. Adam Mackenzie as Auditor of Court, Sheriff Barclay stated that he held the office for sixteen years, and it was very seldom that his audits were rejected, and in no one case had an appeal from his findings been taken to the Sheriff. The appointment was confirmed.

Sheriff BARCLAY then said: "I have now the pleasure of introducing to you our new Sheriff, and you to him. As you are aware, this is the tenth Sheriff with whom I have been privileged to act. It is said the Sheriffs of Perthshire, like the Sovereign, never die, but there had been one, however, who had departed this life while I have been in office. All the others were promoted in one way or other. Of the nine Sheriffs with whom I have co-operated six went to the Court of Session to be judges. One of these went to the House of Lords, and another was also promoted there without passing the judicial bench at Edinburgh. When the seventh Sheriff in order came, I thought that that being the complete number in sacred and classical language, I had seen the last; but that did not so happen. There came another, and that time I came

to the conclusion that, the octave being the highest note in music, this was surely the last. But another came, and this time I did not know what to say. On that occasion a wag wittedly and perhaps wickedly remarked that I had a chance of being wrecked upon a "Lee" shore, but that was not to be. Now I have my tenth, which is, I think, my decalogue. There is, however, an eleventh commandment in the New Testament dispensation—I have the authority of a very high divine, Bishop Usher, for it—the Divine Redeemer said, 'A new commandment I give you'—and therefore I am not without hope that I may have the pleasure of addressing you on another similar occasion. It would be a work of supererogation to say anything about Mr. Macdonald. You all know him, if not personally, at all events by that excellent treatise on criminal law which he has published. You are also aware—and it is a great matter to know it—that he is not unacquainted with the functions of Sheriff, having a considerable time held that office in Ross and Cromarty. I am sure we are all very well pleased to see him here, and we shall be delighted to have him for a while until he removes to a higher station. I have now great pleasure in introducing the Bar to you, Sheriff. I am quite satisfied that I present a body of men skilled in the law; above all, men honourable, and of the greatest integrity in all their business. I have not—and it is with a great deal of pride that I say it—heard a single word of censure from the Court of Session upon the preparation of record or any of the proceedings of this Court. I have great pleasure in introducing the Bar to you, and I am quite satisfied you will find that I have not exaggerated their qualities."

Mr. WM. MACLEISH, President of the Society of Solicitors, said: "As representing the procurators of this Court, I have great pleasure in offering your Lordship our hearty congratulations on your appointment as Sheriff of Perthshire, and in assuring you how cordially we concur in the observations which have fallen from our Sheriff-Substitute, Dr. Barclay. The seat which you now occupy has been filled by a long line of distinguished lawyers, and I am sure I express not only my own sentiments, but the sentiments of every member of this Bar, when I say that we rejoice very much indeed that the high appointment of Sheriff of this county has been conferred on one so well qualified, as your Lordship is known to be, to tread in the footsteps of your distinguished predecessors in this office. As Sheriff Barclay has stated, the position of Sheriff is not new to your Lordship. We know well the great estimation in which your judicial qualifications were held in two important northern counties where you filled a similar office before your appointment to the high official position which you more recently held. We welcome your Lordship to Perthshire, assure you that we shall as members of this Bar facilitate the transaction of the business of your Court by every means in our power; and nothing shall be wanting on our part to assist in rendering the discharge of the duties of your important office not only useful to the public but agreeable to your Lordship personally."

In calling on Mr. Smythe, as representing the county, Dr. Barclay remarked that an ancestor of his was last century Sheriff of this county, and afterwards became Lord Methven of the Court of Session. Since he (Dr. Barclay) held office in the county, the Convenership has always been in the Methven family, first, by an elder brother, and now, for many

years, by the present Laird of Methven. Few know the care and attention which Mr. Smythe devoted to the many and arduous duties of his office.

Mr. SMYTHE of Methven, Convener of the County, said : " It is a great gratification to me, on the part of the Commissioners of Supply, to welcome you as our new Sheriff. Mr. MacLeish has spoken on behalf of the Bar and the legal practitioners, and I think I may speak on behalf of the officials connected with the county. I trust you will find we shall always be glad to co-operate with you in everything connected with the county. It is certainly a pleasant thing to think that we have so distinguished a man now in the position of Sheriff of this county. I myself have seen, like Sheriff Barclay, I believe the whole list of Sheriffs he has enumerated, and have been on friendly—I may say very intimate—terms with them. Although this is the first time I have had the honour of being personally introduced to our new Sheriff, I may say that, when I first came to Scotland, I received much kindness from his most excellent grandfather, Baron Hume, and I feel that I have a warmth of affection towards him owing to that circumstance. I also wish to state, on behalf of the Commissioners of Supply, how much we sympathize and rejoice in the promotion of our late Sheriff, and how much we were indebted to him for the courtesy, and kindness, and assistance which he always showed in regard to our county matters. I think that I may safely expect that we shall receive the same assistance at the hands of your Lordship. "

Bailie CHALMERS said : " I have to congratulate the Perth Bar in having our new Sheriff, Mr. Macdonald, appointed to his place to-day. I can only say that the Magistrates will try as hitherto to assist him in everything connected with the town. "

Sheriff MACDONALD then replied. He said : " Sheriff Barclay, you have spoken in very kind terms of myself, and I am quite sure that my long acquaintance with you will not cease to be friendly now that we stand in an official relation to one another, as it has always been in the past. This I feel quite sure of, that the great experience you have of conducting the business of this county will be of most valuable assistance to myself; and I can congratulate the members of the Bar here, and all the inhabitants of this place, that you are still able so efficiently to discharge your public duties. Mr. President and gentlemen of the Bar, the repute of the Perth Bar has always been good, and I have never heard anything to its detriment. Your conduct at the table doubtless to a great extent has contributed to your friend, Dr. Barclay, standing as he does in such health and strength before you. If any witness is required of that, it is the fact that he is so happy among you to-day. To the Convener of the County I can only say that, whatever assistance I can give in connection with the forwarding of county business, will be cheerfully given. To the Magistrates I may also say that the town of Perth is endeared to me by an association of a very close kind, and it shall always be my earnest desire to aid the Lord Provost and Magistrates in everything for the welfare of the town. "

The proceedings then terminated.

*What Judicial Factors can be appointed by Sheriffs.*—The attention which has been drawn to this subject by the articles in our



February and March numbers (pp. 81 and 120) has already begun to bear fruit in one of the directions which we indicated it should take. The present state of matters we ventured to describe as "a scandal and calls for immediate remedy at the hands of the Sheriffs." The Sheriff of the counties of Caithness, Orkney, and Zetland has issued the following order in reference to factories in his Courts:—

"*Order of Court as to Petitions for and the Appointment of Factors in this Court.*—The first interlocutor shall order intimation, advertisement, and service on every one who may have an interest. After intimation and service, where minors or pupils are interested, tutors or curators *ad litem* will be appointed and ordered to report as to the expediency of the proposed appointment and who are (if any) creditors of the deceased. The next interlocutor shall contain an approval or disapproval of this report, and refusal or appointment of a factor under the conditions of this order of Court and on finding caution *quam primum*. The caution offered will be certified as sufficient by a justice of the peace and reported by the Sheriff Clerk to the Sheriff. No creditor of the deceased shall if possible be appointed as factor or accepted as a factor's cautioner. On caution being found as above, 'the Sheriff should appoint the factor to report within six months on the assets and liabilities of the estate, with a list of the names of creditors and his past and proposed management, and the Sheriff Clerk shall put the case to the roll on the first court day after the expiry of said six months.'

"At this enrolment, or any continued or other diet, the Sheriff shall by remit or otherwise ascertain the real state of the estate and the interest of beneficiaries and creditors therein, and provide by means of a scheme or other order for the future management of the factor being carefully supervised, the factor being ordered to lodge annual accounts, and to lodge all moneys in bank on an account with or on deposit receipt to him as factor, as provided in the Pupils' Protection Act, or the Sheriff shall appoint a new factor, who shall conform to *above* regulations.

"On the death of a cautioner the Sheriff Clerk shall put the case to the roll in order that the Sheriff may order new caution and suspend the factor's actings until that is found and reported to the Court as at the original appointment, or appoint a new factor, who shall conform to above regulations. In order to strengthen the Sheriff-Substitute's hands in carrying into effect the above regulations the Sheriff Clerk shall once a year at least put all existing factories to the roll at one of the Sheriff's special sittings, and intimate this enrolment to all the factors, that by themselves or their agents they may be present to give any explanations necessary as to their management of the estates under their charge.

"The penalty or mulct for breach of any of these regulations will be determined by the Court in each case. A factor may at any time enrol the factory to crave instructions as to the factorial management.

“Before the factor’s discharge is granted, which it may be on a motion by minute lodged in process, it shall be ascertained by remit or otherwise that he has satisfactorily accounted for all the funds committed to his care and observed the provisions of this order, and carried out any instructions he may have received as to the factorial management.”

*Appointments.*—The new Advocates-Depute are the Hon. H. J. MONCREIFF (1863), Mr. ANDREW RUTHERFURD (1857), Mr. DAVID BRAND (1864), and Mr. J. J. REID (1870). Mr. A. E. HENDERSON has been appointed Assistant Advocate-Depute for the Glasgow Circuit. Mr. J. P. COLDSTREAM, Assistant Depute Clerk of Session, has been made Assistant Clerk in the First Division, in room of the late Mr. Shiress. Mr. ROBERT BROWN, Clerk to the Lord Advocate, succeeds Mr. Coldstream at Lord Rutherford Clark’s bar.

The LORD ADVOCATE, the SOLICITOR-GENERAL, the DEAN of FACULTY, and Mr. J. H. A. MACDONALD have all received patents as Queen’s Counsel. We are glad to be able to chronicle this fact, as, though there are no outer and inner bars in the Scottish Courts, it is only fit that the law officers of the Crown should be put in a position which will not entail them descending to stuff at the expiration of their term of office. Dr. Fraser is, we believe, the first Dean of Faculty who has ever worn silk; we hope that the precedent now established in his case will be followed in future.

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## THE SUCCESSFUL COUNSEL.

### A HYMN TO HIM.

“And o’er the hills and far away,  
Beyond their utmost purple rim,  
Beyond the night, across the day,  
The happy princess followed him.”

TENNYSON.

How rapidly he makes his way,  
This most successful legal limb!  
Through half the night and all the day  
The happy agents follow him.

There falleth from his fluent lips  
The wisdom of the seraphim,  
And every buzzy-body sips  
The honey that’s distilled by him.

He’s witty too. *You* jest: thereat  
You see their Lordships looking prim.  
Your favourite joke that fell so flat  
Is exquisite when said by him.

We gaze on, wheresoe'er he goes,  
 His figure, be it squat or slim ;  
 And even to his boots and "clos"  
 The wondering juniors copy him.

The briefless, pacing day by day  
 The weary boards, not "in the swim,"  
 With grief, but not with grammar, say,  
 "We wish to goodness we were him!"

He snubs, he sneers, he jibes, he frowns,  
 Then smiles illumine his visage grim ;  
 We bear his temper's ups and downs,  
 And even the judges bow to him.

"'Tis only pretty Fanny's way,"  
 And "geniuses must have their whim ;"  
 Whate'er he says or doesn't say,  
 The happy agents follow him.

Retainers of both kinds he hath :  
 His Pistol, Bardolph, Peto, Nym,  
 Enjoy his smiles, endure his wrath,  
 And serve as useful foils to him.

Law only charms this legal swell :  
 A primrose by the river's brim  
 (See Wordsworth, case of *Peter Bell*)  
 A primrose only is to him.

You talk about historic times—  
 The strife of Strafford, Hampden, Pym ;—  
 Of art,—the last new poet's rhymes :—  
 A vacant stare's vouchsafed by him.

Of politics he knows but this,  
 It does not pay to turn and trim ;  
 Nor cares for them, yet must not miss  
 What prize may be in store for him.

Time passes ; he becomes a judge :  
 Sudden his lustre groweth dim ;  
 His wisdom now you call it fudge,  
 And nobody cares a rap for him.

Ah ! every dog must have his day,  
 He's no more now than Jack or Jim ;  
 And all the happier agents say,  
 "Sir Newman quite eclipses him."

He sees his sun of glory set  
 'Neath the horizon's purple rim ;  
 And thinks of days, with grim regret,  
 When crowds of clients followed him.

## Notes of English, American, and Colonial Cases.

**PARLIAMENT.**—*County vote—Interest in land of uncertain duration—Land devised in trust for sale—Estate of cestui que trust pending sale.*—A testator devised his copyhold lands to trustees upon trust to sell and invest the proceeds and pay the dividends to his wife for life, and after her decease to divide the proceeds among his children equally. The share of each son to become vested and payable at twenty-one; the share of each daughter to become vested at twenty-one or marriage, and the trustees to stand possessed of each daughter's share upon trust to pay the dividends to her during her life for her sole use independent of her husband (if any), and after her decease in trust for her children. The trustees duly proved the will, and were admitted to the copyholds according to the custom of the manor. The wife predeceased the testator, and at the time of his death there were three sons and one daughter; the daughter was married and had issue, who were infants. The sale of the copyhold lands was postponed, and in the meantime the children of the testator became of full age, and by verbal agreement among themselves, in which the husband of the daughter concurred, agreed to keep the copyhold lands unconverted. The rents, which were of sufficient annual value to confer the franchise on each of the testator's children, were received by the trustees, and divided amongst the testator's children yearly. The appellant, one of the testator's sons, claimed to vote as a freeholder in respect of his equitable interest in the copyholds:—*Held*, that the appellant had no such freehold estate as would entitle him to be registered as a voter for the county.—*Spencer v. Harrison*, 49 L. J. Rep. C. P. 188.

**DAMAGES.**—*Personal injuries—Railway company—Breach of contract of carriage—Measure of damages—Direction to jury.*—The right direction to a jury, who have to assess damages in an action for personal injuries sustained in a railway accident by a professional man making a large income, is that, in respect to the plaintiff's money loss, they should not attempt to arrive at an absolute or mathematically accurate compensation, but should give a fair and reasonable compensation, taking into consideration the amount of his income when the injuries were sustained, the length of time he has been deprived of that income, the probability of his having continued to earn it if he had not been injured, the prospect of his being able to earn anything in the future, and all the other circumstances of the case. The distinction between such a case and the case of *Hadley v. Baxendale* (9 Exch. Rep. 341; 23 L. J. Rep. Exch. 179) pointed out.—*Phillips v. The London and South-Western Railway Company*, (App.) 49 L. J. Rep. Q. B. 233.

**DISCOVERY.**—*Letters written by master in answer to inquiries as to servant's character—Libel—Privileged communication—Production.*—A master kept copies of the letters written by him in answer to inquiries respecting the character of a servant late in his employ. The servant commenced an action for damages against his master, alleging that the letters were libellous, and took out a summons for liberty to inspect and take copies of the copy letters:—*Held*, that the copy letters were not privileged from production. *Quære*—Whether, if the defendant had deposed on oath that the production of the letters would incriminate him, they would have been privileged from production.—*Webb v. East*, (App.) 49 L. J. Rep. Q. B. 250.

**JUSTICE OF THE PEACE.**—*Order for expenses of conveying prisoners to gaol—"Period of committal"—Prison authority.*—The Prisons Act of 1877 (40 and 41 Vict. c. 21) has not transferred to the Secretary of State the liability for the expenses of conveying prisoners after summary conviction or committal for trial by a magistrate to the gaol named in the warrant. Such expenses still fall, as enacted in 27 Geo. II. c. 3, and 11 and 12 Vict. c. 42, in Middlesex upon the overseers, and in other counties upon the treasurer of the county where the offence alleged against the prisoner was committed.—*Mullins v. The Treasurer of the County of Surrey*, 49 L. J. Rep. Q. B. 257.

# THE JOURNAL OF JURISPRUDENCE.

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## OFFER, ACCEPTANCE, AND WITHDRAWAL OF OFFER BY CORRESPONDENCE

THE class of cases, says Mr. Pollock in his "Principles of Contract" (p. 11), where a contract is entered into by correspondence between persons at a distance, is one of great and increasing importance. It is one, too, we may add, of great difficulty and complication, one requiring the exercise of a very fine discrimination on the part of the judge, and one in which the opinion expressed on any particular case ought to be very carefully guarded, so as not to overlap the point immediately calling for decision, and by inadvertence lay down a principle which may lead to embarrassment in cases not contemplated at the moment, which are similar to the case before the Court, but which really require the application of another principle altogether.

Some time ago we called attention (see vol. xxiii. p. 617, and *ante*, p. 143) to a recent case of this kind, *The Household Fire Insurance and Carriage Accident Co., Limited, v. Grant* (L. R. 4 Ex. Div. 216), in which the English Court of Appeal held that when an offer was sent and an acceptance was returned, both by post, the contract was complete, although the acceptance never reached the offerer. The theory on which this decision was based was that the offerer by sending his offer by post had not only given an implied invitation to reply by the same means of communication, but that he had constituted the post office the common agent of himself and the acceptor. We pointed out that this theory was not only a fiction, but a fiction directly contrary to the fact, and that the circumstance of the post office being first the agent of the offerer in transmitting the offer, and afterwards the agent of the acceptor in transmitting the acceptance, by no means clothed the post office with the character of joint or common agent for the two parties. We also showed how this fiction had come to take root in the English law by its unnecessary importation into the case of *Dunlop*



*v. Higgins*, as decided in the House of Lords (Feb. 24, 1848, 9 D.), a case the judgment in which had sufficient grounds of its own to stand upon. And we also showed by a number of illustrations the absurd consequences to which this theory logically led. Among others this was adduced, that if a withdrawal of the offer was put into the hands of the common agent, the post office, before the acceptance was posted, the contract would not be completed by an acceptance despatched before the arrival of the revocation, and that, too, although the withdrawal never reached the offeree. The case contemplated of a withdrawal of an offer being posted before but not arriving till after the acceptance was despatched has since that time, and, oddly enough, for the first time, come before the English Courts; and the English judges had an opportunity afforded them of carrying the principle of the *Household Carriage Company's* case to its inevitable logical consequence, and so going wrong, or of repudiating that principle and going right. They have done neither. They have held that, to quote the rubric of the case, "the withdrawal of an offer, made and accepted by letters through the post, is inoperative if the notice of withdrawal does not reach the person accepting until after the letter of acceptance has been posted." But at the same time they have upheld the authority of the *Household Fire Insurance Company's* case, Mr. Justice Lindley observing that it may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris's* case, L. R. 7 Ch. App. 587; *Dunlop v. Higgins*, 1 House of Lords Cases, 381), even although it never reaches its destination (*Household Fire Company v. Grant*, *supra*).

The circumstances of this case (*Byrne & Co. v. Leon van Tienhoven & Co.*, 42 L. J. Rep. 371) were these. The defendants in Cardiff on 1st October by letter offered to sell plaintiffs in New York a quantity of goods, "subject to their reply by cable on or before 15th October." The plaintiffs received the letter on 11th October, and an acceptance by telegraph was despatched by them and was received by the defendants on the same day. In the meantime, on the 8th October, the defendants sent a letter to the plaintiffs recalling their offer, which letter reached the plaintiffs on the 20th October. The Court held that the revocation was inoperative, and the contract was complete on 11th October, the day of despatching the acceptance. It will be observed that the acceptance here was not communicated by post but by telegraph, but this is a circumstance of no materiality in itself; nor was it so regarded by the Common Pleas Division, who speak of the case all through as of one where the acceptance had been "posted."

In giving judgment Mr. Justice Lindley said there were two questions necessary to be considered for the determination of the case before the Court, viz. "(1.) Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the

offer has been sent? (2.) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. . . . This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier." The learned judge then considers the next question, and he holds that the posting of the letter of revocation was not a sufficient communication. "The withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post the contract is completed the moment the letter is posted (*Harris's case*, L. R. 7 Ch. App. 587; *Dunlop v. Higgins*, 1 House of Lords Cases, 381), even although it never reaches its destination (*Household Fire Co. v. Grant*, L. R. 4 Ex. Div. 216, qualifying if not overruling *British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108). When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or in other words, that he has made the post office his agent to receive the acceptance and notification of it; *but this principle appears to me to be inapplicable to the case of the withdrawal of an offer.* . . . There is no legal principle or decision which compels me to hold contrary to the fact that the letter of the 8th October is to be treated as communicated to the plaintiff on that day, or on any day before the 20th, when the letter reached them. But before that letter had reached them they had accepted the offer both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th October of their offer of the 1st was inoperative, and a complete contract binding on both parties was entered into on the 11th October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn."

The answers to the two questions just amount to this, that the withdrawal is not effectually made by merely putting the letter of withdrawal in the post. We ask how it can be said, then, that the

acceptance is effectually made by merely putting the letter of acceptance in the post? The principle of the decisions about acceptance is, he says, that the offerer "has made the post office his agent to receive the acceptance and notification of it." He should have said, "has made the post office the joint or common agent," for that is the expression and that is the doctrine. "This principle appears to me inapplicable to the case of the withdrawal of an offer." Why? We desire to know the reason why the theory of the post office being the common agent extends so far and extends no farther, why it stops short all of a sudden, what other principle comes into operation and stays its progress?

The decision of Mr. Justice Lindley is irreconcilable with the doctrine on which the *Household Fire Company's* case proceeded, viz. that the post office is the common agent of the offerer and acceptor. It is irreconcilable also with the whole line of thought from which that doctrine resulted. Let us look at the genesis of that doctrine as traced by Lord Justice Thesiger. "Whatever in abstract discussion may be said as to the legal notion of its being necessary in order to the effecting of a valid and binding contract that the *minds of the parties should be brought together at one and the same moment*, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, the contract by correspondence is absolutely concluded at the moment that the continued offer is accepted, it is difficult to see how the two minds are to be brought together at one and the same moment. . . . But, on the other hand, it is a principle of law that the minds of the parties must be brought into mutual communication. . . . How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than *that of treating the post office as the agent of both parties*." It cannot be said that the element of the two minds meeting at one and the same moment, "which is practically the foundation of English law upon the subject," is to be found in a case where at the time the one party accepted the offer the other had withdrawn it. The decision in *Byrne's* case is not reconcilable either with the doctrine that the post office is the common agent of the parties, or with the underlying principle of the English law of contract, to prevent the discarding of which this post-office theory has been invented.

Mr. Justice Lindley, after making the observations we have quoted, proceeded to point out "the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention was to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known

to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties." We confess that the argument from convenience and the argument from the alleged underlying principle of the English law as to the formation of a contract seem to us to point in different directions. And it is to be remembered that the argument from inconvenience can be pressed against the conclusion that an acceptance is effectual if posted whether it arrives or not, just as much as against the conclusion that a withdrawal is effectual if it is posted before the acceptance is. If the proposer is bound by an acceptance which never arrives he may have to wait an indefinite period before he knows whether he is bound or not. The acceptor, says Mr. Justice Lindley, had no reason to suppose that a withdrawal had been sent. Has the proposer any reason to suppose that an acceptance had been sent when it does not arrive in due course of post, and when indeed it never arrives? "It is not reasonable that the proposer should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has arrived, or whether it is accepted or not, for the other party need not answer at all. The acceptor may much more reasonably be left to take the risk of his acceptance miscarrying, for in practice he can easily take means, if he think fit, to provide against this" (Pollock's Principles of Contract, p. 12).

The error which has led to so much difficulty in this class of cases lies in the metaphysical notion that there must be some moment at which the minds of the parties actually meet; that is to say, with a knowledge that they have met. The principle is applicable in cases where the contracting parties are personally present, but it is not applicable in the case of contracts entered into where they are not, and cannot be, personally present, and where consequently the contract is entered into by correspondence. The principle of mutual assent took the form of its expression naturally enough from the circumstances in which the principle was originally applied. The old principle is still applicable to a new state of circumstances; the old expression of the principle, which is an accident and not of the essence of the principle, is not so applicable.

The true ground for the decision in *Byrne's* case—a perfectly sound judgment—is not stated in the decision. The decision is remarkable, for after announcing an adherence to the doctrine of the class of cases of which the *Household Fire Company's* case is one, and intimating an adherence to it so far as the circumstances of these cases were concerned, we are simply told that it does not extend to the present case. The true principle is that by making an offer the proposer has given the offeree a right to regard it as an offer continuing until he has received notification of its withdrawal. In the American case of *Taylor v. Merchants' Fire*

*Insurance Company* (see Langdell on Contracts, p. 97), the insurance company's agent wrote to the plaintiff offering to insure his house; and the plaintiff wrote and posted a letter of acceptance, which was received in due course. While the acceptance was in transit the house was burned down. The insurance company contended that there was no completed contract. The Court held there was. "We are of opinion," they said, "that an offer under the circumstances stated is intended and is to be deemed a valid undertaking on the part of the company that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail accepting them; and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. . . . On the acceptance of the terms proposed, transmitted by due course of mail to the company, *the minds of both parties have met in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as a continuing offer until it shall have reached him, and it shall be in due time accepted or rejected."

The case of the withdrawal of an offer being sent before, but not received till after, the acceptance has been sent, is, according to Mr. Justice Lindley, a new case in the English Courts. This American decision, though some of the principles laid down are applicable to the case, is not an express decision upon it. The case contemplated is not unfamiliar to Scottish lawyers. A decision on the point was given so far back as the year 1855, in *Thomson v. James* (18 D. 1). It is a pity that when this new point came up for decision, and no direct authority was to be found in the English Reports, in consequence of which the Court was obliged to have recourse to the opinions of living writers, Leake, Benjamin, Pollock, and to the American case, which is not a direct authority either—it is a pity, we say, that the attention of the Common Pleas Division was not drawn to the case of *Thomson v. James*. The English judges seldom refer to Scottish cases; and probably they have not ready means of access to the Reports. This case, however, is to be found at full length, argument and all, in such a well-known book as Langdell's "Cases on the Law of Contracts," an American work. If *Thomson v. James* had been brought before the notice of the Common Pleas Division we should probably have found in the judgment in *Byrne's* case, what we do not find at present, a satisfactory statement of a principle justifying the decision. It is well to have a sound decision, but it is always more satisfactory when a good reason for it is stated. A perusal of *Thomson v. James* would also have given an idea of the way to argue a case, the way to decide it, and the way to express the decision. The case was argued with great skill and with rare erudition. No relevant consideration is left unnoticed, no source of information, however recondite, is left unexplored.



The principle which affords the true solution of the question is grasped by the Court, and the error is avoided of laying down a principle more general than was required for the purposes of the case, and which might be applied to future cases not at the moment contemplated and to which it might prove inapplicable. Indeed the expression of the principle of decision is carefully guarded; it is shown how far the principle extends, and care is taken to show to what cases presenting some similarity to that before the Court it does not extend. In *Thomson v. James* an acceptance of an offer and a withdrawal of the offer were posted on the same day and consequently the two letters crossed. The Court held the contract had been completed.

"I hold," said Lord President M'Neill, "that a simple unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted by post; but I hold that the mere posting of a letter of recall does not make that letter effectual as a recall, so as from the moment of posting to prevent the completion of the contract by acceptance. An offer is nothing until it is communicated to the party to whom it is made, and who is to decide whether he will or will not accept the offer. In like manner I think the recall or withdrawal of an offer that has been communicated can have no effect until the recall or withdrawal has been communicated, or may be assumed to have been communicated, to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer until by the lapse of a reasonable time he has lost the right, or until the party who has made the offer gives notice—that is, makes known that he withdraws it. . . . It was contended that as the offerer had changed his mind, and had posted a letter announcing that change before the offeree had declared his mind by posting his acceptance, the intention or consent to purchase cannot be held to have continued until the consent to sell was declared, and consequently that at no one moment of time was there *in idem placitum consensus atque conventio*." His Lordship repudiated the universal applicability, at least, of this notion.

"Having communicated his purpose to purchase, the offeree is entitled to regard that purpose as unchanged until a change is communicated. He has acquired a right, which he retains until it is withdrawn from him by a communication from the party who conferred it. If he exercises the right by a completed act of acceptance of the offer before notice has reached him, or ought in ordinary course to have reached him, the contract will be binding, although a change of mind on the part of the offerer had taken place, and although he had taken a step towards communicating that change of mind by writing a letter or even putting it in the post office. In a great many cases the maxim that there must be a concurrence of will at the moment of completion of the contract cannot be rigidly or literally applied."

Then treating of the question of acceptance which necessarily had been brought forward in the discussion, his Lordship states the true principle applicable to such a case, and also guards himself against the view which has been given effect to in the *Household Fire Company's* case. "When an offer is made by letter from a distance through the medium of the post, the offerer selecting that medium of transmission authorizes and invites the offeree to communicate his acceptance through the same medium. If the offeree avails himself of that medium of communication, and transmits his acceptance properly addressed through the post office, and if the acceptance reaches its destination in the due and regular course of that medium of transmission, I am of opinion that the act of acceptance was completed by the putting of the letter into the post office; and that a letter of recall which did not arrive till after that act cannot be held to have interrupted the completion of the contract."

The same conclusion was arrived at in *Byrne's* case as in *Thomson v. James*. The difference between the judgments is this, that in the English case the Court state the grounds for holding that an acceptance when once posted, although it never arrives, completes the contract, but do not state the ground for the judgment they are pronouncing, viz. that the withdrawal of an offer when merely posted before the acceptance does not prevent the completion of the contract, a decision at variance with the principle of the former decision; and in the Scottish case, the Court, while disclaiming the notion that an acceptance that never arrives is effectual, do state the reason for the judgment they are pronouncing with regard to the withdrawal of an offer.

The opinion of Pothier is contrary to the view taken in *Thomson v. James* and in *Byrne's* case. "If I write," he says, "to a merchant at Leghorn a letter in which I propose to purchase of him a certain quantity of merchandize at a certain price, and before my letter can have reached him I write him a second letter, by which I intimate that I no longer desire to make this purchase, or if before that time I die or lose the use of my reason, although this merchant of Leghorn at the receipt of my letter, in ignorance of the change of my intention or my death, or my insanity, answers that he accepts the proposed bargain, yet no contract of sale arises between us; for my intention not having continued until the time at which my letter was received and my proposal accepted, the consent or concurrence of our wills, necessary to form a contract of sale, has not occurred. This is the opinion of Barthole and of the other doctors cited by Bruneman, who have with reason rejected the contrary doctrine of the Gloss" (*Traité du Contrat du Vérité*, sec. 32). Some countenance to this view has been given by writers on English law. It is referred to with approval in Chitty on Contracts (p. 12), and in a note to *Head v. Diggon* (3 M. and R. 102). Pothier adds that "if my letter causes the merchant to be at any expense in proceeding to execute

the contract proposed, or if it occasion him any loss," then "I am bound to indemnify him unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity that no person shall suffer for the act of another." Mr. Benjamin in his book on Sales (p. 58) has pointed out that Pothier in this suggestion or admission of an equitable remedy has overshot the mark and virtually contradicts himself. He assumes that the contract is not binding, and that consequently the offer may be retracted; yet he makes the offerer liable for the damage caused by a contract not being entered into, which the offeree *ex hypothesi* had no right to expect would be entered into. Lord Ivory in *Thomson v. James* had made a similar criticism. "The exceptions to his rules which he admits, themselves are destructive of his rules. He admits that damages may be due if an offerer changes his mind; but why give damages if no wrong is done? And no wrong can be held to be done if an offer is a thing essentially subject to recall, as much as if the power of recall were an expressed condition of it when made" (18 D. 16).

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### WHENCE ARE SHERIFFS ?

OUR latest historical inquirer as to the office of Sheriff, Mr. Dove Wilson, assumes, as all the shallow writers on the subject have done in England, that "the office of Sheriff" is "derived in both instances from the same Anglo-Saxon source." On the other hand, it is related of a northern Sheriff, that on the occasion of his powers and jurisdiction being called in question in connection with the arrangements for a royal visit by some police magistrates under the Act of 1852, he vindicated the prior claims of his office by a reference to the mention made of it in the Book of Daniel (chap. iii. verses 2 and 3). This latter position seems to us to be abundantly supported by what Professor Robertson Smith, of Free Kirk notoriety, has observed in the East, and chronicled in one of his letters from that far-off country which he sent to our contemporary the *Scotsman*. In speaking of the administration of justice in the Hejaz the Professor wrote:—

"The real power lies in the hand of the Grand Shereef, and his representative, the Shereef Fawwaz, is the strong man of the place. Fawwaz is now an elderly man, with a fine tall person, a keen commanding eye, and a dignified manner. He is greatly respected and feared by the Arabs for his severe justice. Fawwaz is a pure Arab in his habits and ways of thought. He has never been abroad, and is as ignorant as a child of the progress of European ways and inventions in the East. When I called on him, the conversation turned chiefly on railways, telegraphs, telephones, and

the like, and Ismail the Anglophile got so eloquent on the wonders of England that the old gentleman was perfectly confounded. But he knows the Arabs, and keeps a firm hand over them; and as most people would rather be judged in Arabic fashion than by Turkish law, he is far the most important judge in the place. His jurisdiction, however anomalous it may appear in a district nominally Turkish, is undisputed, and includes the power of life and death. Hosein and Al Mas gave me a very favourable picture of the wide jurisdiction which Fawwaz, as representative of the Emeer, exerts even over remote tribes far away through the Nejd. But from other and less partial sources I gather that this picture was considerably exaggerated. Over the settled populations of the Hejaz—the Hadhr or agricultural Arabs—the Shereef has practically a complete hold. The Bedouins cannot altogether dispute his authority, for they must from time to time visit the towns to buy and sell, and thus come within the sphere where he has effective jurisdiction. His warrant, too, can generally be executed even in remote places when he desires to arrest an offender. But justice among the Arabs is properly a private matter, and parties in a dispute may either betake themselves to self-help, or if they appeal to a judge, regard him rather in the light of an arbitrator. In such tribes as the 'Oteibe, who live far from the towns, the ordinary appeal is to local sheikhs, their own hereditary judges, and in these courts the reference is not to law but to ancient precedent. Precedents, says a rhyming adage, remove uncertainties—*Al-Sawálif tarudd el-Mohálif*. For an 'Oteiby to appeal from these judges to the Shereef would be held a 'shame.' Nevertheless, these tribes do in some sense acknowledge the authority of the Shereef. They pay him the tithes, for were they to refuse, he could close their markets to them; on summons they follow him to war against another tribe—drawn mainly by the prospect of booty. And the Ashrâf in general, who are scattered over the country, and form a sort of tribal connection, enjoy a certain religious respect, and a much more practical security, arising from the principle that the blood-money of a Shereef is fourfold. Every Bedouin war has to be squared up by an adjustment of blood-money for the slain, so it is a serious matter to be embroiled with men each of whose heads is worth four. The Shereef, then, is a real prince, with actual privileges and a palpable, though ill-defined, authority. The exact limits of his influence depend on his personal qualities, on his energy in suppressing rebels, and his skill in balancing tribe against tribe. Rebellion, as far as I can gather, generally means the plundering of caravans or a raid on a neighbour's territory. In the case which occurred while I was at Taif, and to which I have already referred, the 'Oteibe, quarrelling with the Harb, attack a caravan under the protection of the latter. In such quarrels the towns have a direct interest, and the Shereef is compelled to interfere. He recovers

the booty, imposes fines, and regulates the blood-money between the tribes. Another case was mentioned to me, when a body of 'Oteibe seized the Beheita. They brought down their families and camels, and while pasturing their herds in the district, plundered all travellers. Here again the Shereef interposed, broke up the force, and recovered the booty."

A correspondent in Egypt about the same date also writes: "At Kenet there was a large enclosure—once a palace. At its gate sat Shereefs of villages hearing complaints, transferring lands, or getting taxes. We were invited to go within, and found a large open square with buildings all round it. Here were courts of justice, committee-rooms, jail, treasury, etc."

When we consider that it is not so very long ago since Sheriffs in Scotland necessarily interposed in the transference of all Crown-lands, and are even yet the recognised authority to distrain on behalf of Exchequer for taxes and other Crown payments, and that their power of life and death, their right to call out the county by *posse comitatus* (Erskine's Institutes, i. 4, 4), though unused are not taken away, the similarity or even identity of the Eastern office is not only suggested but ought to be inquired into. The round towers of Scotland, as well as those in Ireland, have been by many antiquarians classed with similar towers existing in India, and an Oriental origin claimed for them. The progress of the wave of human population, if not of human progress, undoubtedly swept from the East westward. It is not too late to inquire what Orientalisms it bore along with it. The Anglo-Saxon Sheriff may be one of the traces which have been left behind.

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## COMPULSORY EDUCATION.

QUITE lately we had occasion to refer to the question whether judges ought to criticise the law from the seat of judgment. Whether any particular judge will do so, or not, of course depends upon the character of the man. It is unquestionably true that some of our greatest lawyers have been remarkable for the strength of their conservative principles or prejudices, and for the tenacity with which they clung, not only to the political and social system, but even to the system of positive law under which they happened to be born. It is a well-known type of mind. For such a man a legal maxim has all the force of a mathematical axiom: he would as soon think of disputing "respondeat superior" as he would of doubting the law of universal gravitation. It is not perhaps the most enviable of mental conditions, but it has great advantages. If your first principles are kept safe in some distant recess which is not to be approached by inquiry or disbelief, you will apply



them to the actual problems of life with greater vigour and consistency than if you were constantly referring with a nervous anxiety to these principles in order to test their validity by the conclusions at which you have arrived. In the department of the law such a type of mind will tend to produce a rigid and uncompromising administration of the law, as it exists, with perhaps some blindness to its defects. On the other hand, you may find a man, or even a judge, for judges after all are only men in spite of the divinity that hedges the Bench, who has no conception of the abstract, and whose mind, guided by no clear general principles, is very sensitive to the apparent right or wrong of the particular sets of facts which are brought before him. Here there will be a tendency to strain to the breaking point the rules of law where these seem to conflict with eternal justice. This may not make the greatest lawyer, but it is evident that society will owe much to the judge who, probably against the opinion of his profession, which is always more or less interested, ventures from time to time to make suggestions, to which his experience must give importance, for the amendment of the law.

In the excellent address which Sheriff Beatson Bell has recently delivered at Cupar to the Fife and Kinross Teachers' Association, and of which he has had the courtesy to send us a copy, the learned Sheriff occupies a much happier position than either of the two which have just been described. His subject was the compulsory clauses of the Education Act of 1872 (commonly known as Young's Act), and he explains with great clearness the view which he originally took with reference to the proper enforcement of these clauses; a view which he seems to have acted on with satisfactory results in his own jurisdiction, and which has been entirely confirmed by the decisions of the Supreme Court. It is a pleasant task for a judge to explain the successful administration of a statute of great public utility, and nothing could be more useful than that these explanations should be addressed to persons engaged in the work of education. Generally stated, Mr. Bell's view of the matter is that, as he says, "Scotchmen are more easily led than driven," or, as Lord Young said in the Kinloch-Rannoch case, "the compulsory clause is to be applied judiciously and discreetly, and I should even say, gently and tenderly." In the mixed population over which Mr. Bell presides, gathered, as it is, "in moderate-sized manufacturing towns and mining villages, or scattered over an agricultural district," the principle of lenient administration has proved sufficient. The education of the child, and not the punishment of the parent or guardian<sup>1</sup> (in itself a great evil for the child), has been recognised as the object of the compulsory clause; and

<sup>1</sup> Thus it has been recently held in England, as noted by Mr. Bell, that where the remedy of sending a child to an industrial school has been adopted, and an order has been pronounced upon the parent for the expense of maintenance, it is incompetent to prosecute the parent for breach of bylaws.

it is gratifying to learn on the testimony of the Sheriff that "now the working of the Act is fairly understood, matters go along with smoothness." The only cases, apparently, in which he has found a difficulty in securing the attendance of children, were those of widows left with children apt to get beyond their control. But the difficulty in this case arose, in some measure at least, from the natural disinclination of the mother to make the representation, viz. that she was unable to control the child, which is required by the 16th section of the Industrial Schools Act, 1866. Mr. Bell points out that in the great industrial centres cases of this kind might properly be met by the establishment of Day Industrial Schools, but that such institutions are not required, at least that their establishment would not be justified by the necessities of a semi-rural district. Probably, also, if such a day school were started, the parent seeking to obtain the benefits of it would have to make some declaration justifying the surrender of parental control and the interference of the magistrate. It is, perhaps, not so much the declaration as the separation from their children which parents fear in the case of an ordinary industrial school.

Mr. Bell carefully considers the nature and extent of the obligation which is imposed by Young's Act upon the parent to provide elementary education. This obligation does not involve the attendance of children at school, although in the immense majority of cases in which the point might be raised the only manner in which the obligation could be to any extent discharged would be by sending the child to school. One point of doubt does not seem to have occurred in the experience of the learned Sheriff. It is recorded that in certain Sheriff Courts where the parent had pleaded that he himself performed the duty of educating his child, the Sheriff examined the child, or remitted to a teacher to do so. Now, without suggesting that any injustice was occasioned in these cases, and although it may be possible to discover from the examination of a child that education has been given, it is by no means clear that it is generally possible to infer from the ignorance displayed by a child on examination that no education has been given. There are fools in the world, and the parent is under no obligation to bring up the children whom Providence has sent him to any particular standard of intelligence or instruction. There are children on whom both parents and teachers might spend considerable time and labour without producing any appreciable result. But, no doubt, the case put is one of a supposititious and theoretical kind, for in nearly every case it is not pretended that the child can receive education anywhere else than at school. And to constitute a breach of the statutory obligation, even if defined so as to be satisfied only by school attendance, there must be a gross and inexcusable failure. Mr. Bell points out that the Education Acts themselves contemplate the probability of children of school age (viz. five to thirteen) being employed in service, for while employment below the age of

ten is now prohibited, it is clearly lawful for a child between ten and thirteen to attend both a factory and a school, even although the necessary result of this should be to make it impossible for the child to take the proper curriculum of the school. The question whether the clauses of the Education Acts overrode those of the Acts dealing with the employment of children has been repeatedly considered: as regards the Factory Acts, in *Mellor v. Denham*, L. R. 1 Q. B. Div. 241; as regards the Workshop Act, in *Bury v. Cherryholme*, 1 Ex. Div. 457. In both these cases it was decided that the Education Act had not the effect of a general regulation of labour. The question as regards the Mines Regulation Act, 1872, came up before Sheriff Paterson at Ayr some years ago, and he then gave a decision to the effect that the Education Act prevented the employment of children of school age in mines, except indeed where that proficiency was proved. But another rule seems to have been established by the Education (Scotland) Act, 1878, sec. 5, sub-sec. 2. But it is not only such large exceptions to the literal fulfilment of the rule that must be considered. The whole circumstances of each case must be weighed by the school board and the magistrate, for the certificate in the one case and the conviction of the other is not of an isolated fact, but of a certain line of conduct, viz. gross and inexcusable failure certainly extending over some period of time. Mr. Bell makes an observation upon the procedure of school boards before prosecution which seems to us highly reasonable. He advises them to use every endeavour to have the defaulting parents personally present before them, as kindly persuasion, with an explanation of the consequences if it is not accepted, will more probably bring the parents to their senses than a formal threat of prosecution, or even a prosecution itself. And in order to secure personal attendance the Sheriff further advises school boards that, although personal service of the summons to appear is not necessary, they should endeavour to secure that the summons has been actually received and understood by the parent.

Upon disputed questions of the amendment of the law, which are certainly most important for the great centres of population, Sheriff Bell declines to pronounce any opinion, on the ground that they lie beyond the scope of his personal experience. We cannot concur in the doubt he has expressed with reference to the projected extension of the Day Industrial School system from England to Scotland. It may be a new infraction of the established principle of the poor law, but it is infinitely less objectionable than any other form of relief which the law at present gives, and we do not believe that the dangers which have been prophesied will arise.

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## NOTES IN THE INNER HOUSE.

THERE have been during the last six months a considerable number of interesting cases decided by the judges of the two Divisions, to which attention may with advantage be directed, and we have accordingly endeavoured to select a few of these for a brief review, throwing together cases trending more or less upon one another, and having a bearing upon similar legal topics or upon similar bodies of people. Among these we propose first to notice a decision affecting the powers and rights of burghs in their property, and of the magistrates in the administration thereof. We refer to what is commonly known as the St. Andrews Golfing case, reported as *Paterson, etc., v. Bain, etc.* (17 Scot. Law Rep. 225.) The object of the pursuers was to maintain the golfing rights of the public over the St. Andrews Links, and to prevent the construction of a road along the boundary of the links, as abridging their extent for the purposes of the game. The pursuers alleged that by gradual encroachment part of the golfing-ground had come to be used as an access to houses feued by the magistrates as far back as 1820. Both the magistrates and feuars were made defenders by the protectors of the golfing interests, and both resisted the action, the latter founding on prescriptive rights and also upon the consent of the magistrates, the former upon their power of the due administration of the links and regulation of the traffic as being in the interests of all concerned. A proper road, in fact, they argued, was better than having an irregular practice of carts and carriages passing across a part of the links. The magistrates were successful in vindicating their powers, which were deemed to be, moreover, exercised in a manner in no wise calculated to injure the golfers or interfere with their enjoyment of the game. "It will be," said the Lord Ordinary, "an operation *innocue utilitatis*," of which term his Lordship quoted the felicitous translation of a witness, "It will be no disadvantage to any, and a considerable advantage to many;" an expression which, moreover, recalls to us a favourite phrase used each week in prayer by a country minister (who must have some Irish blood in his veins), that the visit to the kirk might prove "the better for all and the worse for none." Very interesting observations were made by the Lord Justice-Clerk at advising upon the powers of the magistrates to construct such a road as this, where, as his Lordship held, no damage was done to the community, and where the *solum* was still retained under the jurisdiction of the civic authorities, while the feuars were positively benefited. We may quote a few sentences from the opinion, which are as follows: "There is no obligation incumbent on the civic authorities to keep every square yard of these commons in grass. They may make footpaths through them, or flower-beds, or clumps of plantation, where these do not interfere with their more primary

destination. They might maintain a lawn-tennis ground, or a skating-rink, or an alcove for a band of music, and they might gravel or causeway or pave the accesses leading to these places. I think they might make at St. Andrews a terrace walk adjoining the sea-beach, if this were out of the way of the golfing course; nor would it affect their right whether it were retained in grass or not. All these things are pure acts of ordinary and reasonable administration, which not only do not infer any alienation of the *solum*, but do not effect any permanent alteration on the surface, as these uses are in their nature temporary. A right to afford an access to the community over ground belonging to themselves might in some circumstances be sustained, even to the partial prejudice of some of the purposes which it had formerly subserved; but no such case is presented here. The operations in question infer only an alteration of the surface, which, while useful to the community, does not to any extent limit or impair the enjoyment of the primary and special uses to which it has been devoted."

The case, however, apart from these general points of interest, had a peculiar and special point of its own, arising in a somewhat remarkable manner; for after the victory of the magistrates in the Outer House, and before the reclaiming note had come on for discussion before the Second Division, an election of a new Town Council took place at St. Andrews, who at once proceeded to withdraw their defences by joint minute signed by their counsel and those of the pursuers, and duly moved in Court. Before, however, any interlocutor had been pronounced, the Town Council met again and rescinded their own decision, putting in a new minute to this effect. An unsuccessful attempt was made to argue that the joint minute must receive effect, but the Court declined to take this view, and the case, as we have seen, proceeded. "It is enough," said Lord Gifford, "that the parties are not out of Court, and therefore we must go on to hear the case on the merits."

This change in the Town Council of St. Andrews and the discussion it gave rise to not unnaturally leads us here to make a few observations on the case of *Herron Petitioner* (17 Scot. Law Rep. 313), arising out of the election of municipal officers at Renfrew. At the annual election seven new councillors were chosen, the whole number being twelve, of whom by statute a majority formed a quorum. Owing, apparently, to disagreements, six of these abstained from attending the meeting of the Council for election of a provost and other officers, and the six who did attend, though they duly went through the form, were not a quorum as required by the Act. Thus there was a regular deadlock, to get out of which the town clerk petitioned the Court to appoint managers (under 3 and 4 Will. IV. c. 76, sec. 27). The Court, however, ordained the recusant councillors to meet and elect their officers, making an order that each and every one of the twelve should attend or allege "a reasonable and sufficient cause for his absence



and failure to act as aforesaid." The difficulty was thus obviated more easily than not long ago at Culross, where no one could be got to act as a councillor at all.

Perhaps it is that bad times make us wince more under the lash of taxation than good ones, but several important revenue questions have been disposed of in the Inner House. The question of inhabited house duty was raised in *Cowan and Strachan v. Inland Revenue*, and in *The Scottish Widows' Fund v. Inland Revenue*, both reported at 17 Scot. Law Rep. 314. In the first case a salesman occupied the second flat of premises entirely used for business purposes otherwise. The man had a salary and paid nothing for his house. He kept the keys and looked after the premises, and his house was quite separate from the rest of the premises, though approached by a stair of which the proprietors had exclusive occupation. In the second case the insurance company had a messenger on the sunk flat and another officer on the third flat, the latter having no internal communication with the society's office. In both these decisions the proprietors were held to be liable in the inhabited house duty for the whole building. The next authority upon this subject is that of *Nicol Campbell v. Inland Revenue* (17 Scot. Law Rep. 407), and though the judgment proceeded upon the same views of the statute which regulated the decision in the *Scottish Widows' Fund* case, yet we cannot refrain from shortly mentioning the circumstances as they were certainly peculiar. The appellant, owning a hotel at Rothesay, built a clubhouse adjoining to it, but made a private door of communication between the hotel dining-room and the club billiard-room, by which, however, access could be had only by members of the club. It was decided that these were not "distinct properties" (48 Geo. III. c. 55, schedule B) but formed one "house." Lord Shand remarked that in the sense of rule 6 in that schedule, "it is a house or tenement let in 'different stories, tenements, lodgings, or landings' that is dealt with, and that is just the ordinary case of a large building consisting of different flats which the landlord or proprietor has let off in different flats. If he has done so, then he is to be regarded as the occupier, and he is the person who is made subject to the inhabited house duty. The practical result is, I think, that those who are imposing assessments of this kind and collecting them are entitled to treat him as the occupier of the whole, and if it be contended, as in a question between tenants of particular flats and the landlord, that they ought to bear a proportion of the inhabited house duty, that must be made matter of arrangement or stipulation between them in order to secure that object, but in a question between the Crown and the landlord of such a house, I think the landlord is the occupier of the house as a whole."

The contention of Mr. Nicol Campbell was that rule 14 of schedule B in the same Act covered the building in question, that rule providing that if any dwelling-house should be divided into

"different tenements," being distinct "properties," then "every such tenement" should be subject to the same duties as if it were "an entire house," and the incidence of the duty was declared to be upon the occupiers. Accordingly here the appellant argued that the tenants being the occupiers were liable. On the other hand, rule 6, under which the Court held the landlord liable. The words of that rule are as follows: "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only," and then it is provided that the owner should be deemed to be the occupier. "A tenement," said the Lord President, "is a portion of the dwelling-house separately occupied," and this observation is the key to the ground of the whole decision. The only rule contemplates the case of different owners in one block of buildings, the other meets the case of one owner with different and distinct tenants all leasing from him.

Yet another question as to the incidence of taxation we find decided in the *Special Case Kinloch's Trustees v. Kinloch* (Feb. 24, 1880, 17 Scot. Law Rep. 444). The point at issue was upon whom fell the burden of income tax payable upon an annuity left to a widow and "exempted from all burdens and deductions whatsoever." This annuity was also declared to be in full of all her legal rights. Two questions practically were raised in the case, the first under sec. 103 of the Income Tax Act (5 and 6 Vict. c. 35), whereby it was argued that such a bequest as this was void as being a contravention of the enactment against "all contracts, covenants, and agreements" made for payment of moneys subject to the tax without allowing deduction thereof. The second question was the more direct one, as to who was bound to pay the tax, the widow out of her annuity or the trustees out of the trust-estate, paying her the annuity clear. The first point was decided in favour of Mrs. Kinloch, the widow, for, as Lord Gifford observed, the provision of the 103rd section has no application to deeds such as that under which this lady claimed her annuity. The deed was a purely testamentary one, and his Lordship added, "I think it clear that bequests, or legacies, or testamentary gifts are not included in the words of the 103rd section of the statute. The object of that clause was to prevent landlords or creditors from stipulating that their tenants or debtors should pay the income tax, which the law intended to impose on the landlord or creditor personally, and the reason of the provision has no application to a gratuitous legacy, or bequest, or gift, which the testator or donor may make as ample as he pleases." The question might have been much altered in its bearing had it arisen under an antenuptial contract of marriage, for example, or some other such deed where there were onerous considerations to be taken into account. The second question was

decided by the Court in favour of the trustees, Mrs. Kinloch being declared liable for the income tax on her annuity. The words used were considered by the Court (although Lord Gifford appears to have felt some difficulty) not sufficiently broad to exempt Mrs. Kinloch and to throw the burden of the tax upon the trustees. The peculiarity of the tax is that it has a very *personal* character, and probably this also weighed with the Court to some extent. Generally, however, a perusal of the report leads us to the conclusion that the judgment was influenced mainly by (1) the form of the bequest itself giving exemption from all "burdens" and "deductions," but without any reference specially to a tax, or the use of any word covering such an imposition. The income tax forming the subject of the litigation is not either a burden on the annuity or a deduction from its gross amount. It is, on the contrary, a tax which is estimated on the whole £1000 per annum left to Mrs. Kinloch, because that £1000 was the total of her income. (2.) Several authorities were cited in which the incidence of this tax had been decided as not bearing on the annuitant, but in these cases the words used were singularly wide; thus in *Mackie's Trustees v. Mackie* (Jan. 15, 1875, 2 R. 312) the testator gave his bequest "free of all taxes," a similar form is found in *Turner v. Mullineux* (Jan. 16, 1861, 1 Johnston and Hem. 334), while in *Festing v. Taylor and the Duchess of Somerset* (Jan. 14, 1862, 3 Best and Smith, 217 and 235) the words were "without any deduction or abatement whatsoever on account of any taxes, charges, impositions, or assessments already or to be thereafter taxed, charged, assessed, or imposed."

It is not always, however, that a wide and general expression will receive such strict interpretation as we have seen applied to *Kinloch's* case, for two examples may be given of Inner House decisions where considerable latitude was given to the expressions used by testators. Thus in *Easson v. Brown* (December 19, 1879, 17 Scot. Law Rep. 239) the testator used the words, "all the money I should leave, wherever deposited," and "the interest of all moneys left by me," were held by the Court to cover Mr. Thomson's whole moveable estate. It must not, however, be forgotten that in this particular instance the language used and the form of the deed was untechnical. It was a popularly-worded will written by the testator himself, and, after all, it came to be a question of intention on his part. "We are not trammelled in Scotland," said the Lord Justice-Clerk, "by any obligation to read this word 'money' in a restricted sense; and I gather from the case of *Byrom* (L. R. 16 Ex. 475) that it is matter of regret with the English Courts that they are fettered in this respect with a train of decisions. With us the word 'money,' like the Latin *pecunia*, may signify only coined money, or may cover all the pecuniary resources of the man who uses it." The only feeling of doubt we confess to feeling in the matter of this decision is created by the use of the word

"deposited" by the testator, which it might with some force be argued can apply only to money in its restricted sense. In a subsequent case, that of *Bruce and Others* (January 20, 1880, 17 Scot. Law Rep. 311), a husband, while leaving absolutely his moveable property to his widow, expressed an "anxious desire" and "a hope" that she would leave in a certain way the amount which "may pertain and be resting owing to her at the time of her decease." She died intestate, and the question arose between her heirs and her husband's heirs as to whether the words used were recommendatory or directory, whether in point of fact Mrs. Barclay had been during her lifetime an absolute fiar or merely a trustee or fiduciary *pro tanto* for the benefit of her husband's heirs. It cannot be said certainly what might have been the effect of Mr. Barclay's "anxious desire" and "hope" had he employed those terms with reference to the means he was leaving to his wife, but used as they were with reference not to what he actually was leaving, but to what she might possibly some day be leaving, the words cannot possibly be anything more than a request to an absolute beneficiary. This view was taken by the Court, who accordingly gave effect by their opinion to the contention of Mrs. Barclay's heirs *ab intestato* that they were not bound by the recommendation contained in her husband's will.

The case of *Love's Trustees v. Love* (December 20, 1880, 17 Scot. Law Rep. 260) illustrates the maxim *quod fieri debet infectum valet*, for the testator had directed a division of his property among his three sons, of whom the eldest was to have one estate, the second another, and the third an equivalent in cash. The period of vesting was fixed by the deed as being, (1) so far as a *jus disponendi* went, the testator's death; (2) so far as effecting transmission *ab intestato*, the period of division and conveyance, this being further named as that time at which the debts should all have been paid and the estate valued. There was a further provision that the share of a son dying before the period of division was to fall in to the trust, so that then the two survivors would take equally, the elder always getting the principal estate. Eleven years after the testator the eldest son died, before any conveyance had been granted to him, and leaving a settlement, disposing of his means except the estate, which he left to follow the directions of his father's settlement. The words he used were, "which lands I wish to descend or transmit" to my immediate younger brother John "in terms of" his father's will. This the Court held to be *not* a bequest by the eldest brother to John, but a reverting to the old tripartite division of the father. Now this being so we come to the point as to the meaning of the original testator when he directed that vesting should take place at the period of division and conveyance, and we may quote a few sentences from Lord Deas' opinion which show how the maxim *quod fieri debet infectum valet* applies. "It has been settled," his Lordship said, "by the cases of *Lord Stair* (2 W.

and S. 614) and *Dickson's Tutors* (16 D. 1), not to quote other authorities, that you are to construe a testator's will as meaning that which he has directed to be done, without specifying a time, shall be done within a reasonable time, and the authorities have farther construed a reasonable time to be within one year after his death. Consequently we are to deal with conveyances here on the same footing as if they had been granted within twelve months after the father's death. . . . His (the eldest son's) purpose is the same from the first—a general conveyance under the exception of Threepwood—as if he had said, I might have disposed it away, but I won't exercise my power, because I wish it to go according to my father's destination."

A very interesting series of questions was raised in *Hamilton and Stewart v. Wright and Sharp* (January 16, 1880, 17 Scot. Law Rep. 293). Sharp was married in 1841, and in 1854 she went through a marriage ceremony with Wright and by him had two children. They subsequently quarrelled, and she deposited £65 in bank in the names of Hamilton and Stewart as trustees for Sharp, for her use during her life and her children after her death. Wright then discovered that Sharp's former husband was alive, and he claimed the deposited money, which claim she resisted, claiming alternatively to have it paid her or at least kept for her life-interest and the children in fee. It was proved that Sharp had made the money by her own exertions, and that it formed part of a joint fund divided between them on their separation. The Court gave the whole money absolutely to Sharp, but did not express any opinion upon the soundness of the Sheriff's law when he awarded it to Wright upon the doctrine that when the marriage turns out to be a nullity from bigamy the guilty wife forfeits all her rights in favour of an innocent husband, and that the *jus mariti* is as effectual in his favour as if the marriage had been a lawful one. The present case turned on its special circumstances, and as to the £65 Lord Deas said, "I cannot deal with a sum of that kind on such great principles." At the same time we have made these remarks on the decision, because no doubt the important principle, though not decided, was raised.

The marital relations were also under the consideration of the Court in a very different state of matters. The City of Glasgow Bank liquidators had placed upon their list of contributories the executors of Mr. Wright, a planter in Surinam, in respect of the holding of stock by Mrs. Wright his wife. This lady, without his knowledge and during his absence in Surinam, bought £306 of the stock of the bank. He never interfered with it, and his name, save as husband of the holder, was not in the books of the bank. The lady drew the dividends on her sole receipt, and the purchase was made out of a legacy derived from her father. The husband was informed of the purchase many years after it was made when on a visit to Scotland, and on his return to Surinam he wrote most strongly



condemning the investment, and saying Mrs. Wright must abide by it and judge for herself, as he would give no advice. He subsequently several times repudiated the whole transaction, and it was not at his death in 1877 included by his executors in the inventory of his estate in Scotland. The view taken by the Court was that these shares formed part of a legacy, the whole of which was gifted by the husband to the wife, and the gift never revoked. "To whom," asked Lord Mure, "did the money belong? Now it was originally Mrs. Wright's. It was a small part of £3000 to which she had succeeded from her father, and which she possessed at the time of the marriage. There is no deed of gift by the husband to the wife, but I agree with your Lordships in thinking that a donation of money of this sort does not require a deed of gift in writing if the facts and circumstances show clearly that the husband had made it over to his wife, and allowed her to use it as her own separate estate." The question was also raised, but not decided, whether a company such as the City Bank, registered under the 1862 Act, transacting with a married woman, and knowingly so, as their own books showed, but taking no steps to obtain a consent or ratification from the husband, could have him made liable as a contributory.

On the 8th of January the Second Division decided a very important case, arising also, like the litigation we have just referred to, out of a fraudulent bankruptcy. The form of the action was that of a multiplepounding (*Brown v. Marr and Others*, 17 Scot. Law Rep. 277) raised by the procurator-fiscal of Glasgow to decide as to the ownership of certain watches which had come into his possession in connection with the trial of Marr, who was sentenced to five years' penal servitude for having stolen or embezzled these and other goods. The questions at issue had special importance to the pawnbroking community, and were taken great interest in by that section of society. Marr, the fraudulent bankrupt and convict, had obtained from a number of wholesale watchmakers and jewellers a quantity of watches on a "sale and return" contract, and having got them he pledged them to a number of pawnbrokers, who were of course in *bona fide* as to the advances made by them on the goods. When Marr and his frauds were exposed the wholesale watchmakers claimed their watches from the pawnbrokers, but the latter declined to give them up unless they were first repaid the advances they had made to Marr. Upon these simple facts it is manifest that questions of great nicety and of novelty arise. Truly, however, we think the main point decided was the meaning of a contract of "sale and return." The Lord Justice-Clerk in his opinion briefly and most forcibly explained the nature of such a bargain. "A contract of sale and return is a bargain which has for its object, on one hand, to increase the market of the wholesale merchant, and, on the other, to enable a retail dealer to acquire a stock for the purpose of trading on his own account without being liable absolutely in the price of the

goods to the merchant from whom they are acquired. It differs in its practical effect from an ordinary contract of sale in one respect, and one only, namely, that the buyer has the right of returning the goods themselves to the seller within a reasonable time and of thereby extinguishing his liability for the price, while, on the other hand, the seller is bound to receive the goods returned in satisfaction of the buyer's obligation, and he is so reinvested in the property. In all other respects the rights and obligations of vendor and vendee seem to be precisely those which are the result of an ordinary contract of sale. In particular, the following seem some of the characteristics of this contract: (1.) The price is fixed to the buyer, and he may pay it on delivery and at any time thereafter. (2.) If he sells the goods, he does so solely on his own account, and for his own benefit, and at any price he pleases. (3.) The seller cannot reclaim the goods while they remain unsold, either within or beyond the period allowed for return. (4.) After the expiration of that period, if the goods are not returned, the seller may sue for the price, which becomes absolutely due by the seller, without any right to return." The point, as will be seen from the quotation we have just given, really turns upon the position in which Marr stood when in possession of these goods. He had a *right* to sell *upon his own account*; it was not in the least the case of a man who sells goods for another, and who has merely a *power of sale* as distinguished from a *right to sell*. The fraud of Marr was no doubt committed upon those who had made this contract with him, but clearly the power of defrauding was given to him by the form of arrangement made. The sellers here of course maintained that the condition of "return" was practically and truly a condition suspensive of the sale, and unless that condition were purged by the lapse of the fixed period the property did not pass. But, as was pointed out from the bench, a remarkable paradox would be the result of such a doctrine; for then a man would be able to sell on his own account that which was not his property, and which only became his when he had sold it. In coming to a decision in favour of the pawnbrokers it is evident that the Court were influenced by the view they took of the good faith of the pawnbrokers themselves in the transaction, and that a different result might have been expected had they not got over what was evidently, from the remarks of the judges, a serious difficulty with them in the matter. It is also manifest that in all such questions courts of law will expect and will require reasonable care and caution before they allow the pawnbroker to claim his advances. If he acts in a reckless imprudent way under circumstances where suspicions should have been aroused, he will change the aspect of affairs and will not be allowed to do otherwise than suffer. As it stood, Marr was not an agent for the wholesale dealers, he was not their messenger for conveying the goods from place to place or person to person, nor their consignee as factor or

otherwise. As Lord Ormidale remarked, "he was to get no commission from the respondents, and he was not restricted by them in regard to the prices he should ask or obtain in the event of his selling them. He was entitled to sell to whom and at what prices he pleased, and the surplus, if any, which he might get over the respondent's prices, previously fixed, was to be his own." Generally speaking, the assumption on the part of the wholesale dealers was that the watches had been *stolen* by Marr, and that being so, that the owners were entitled to recovery of their goods. The fallacy, however, lay in the assumption of the theft. As matter of fact, Marr pleaded guilty to "falsehood, fraud, and wilful imposition." The plea was accepted, and *the charge of theft was departed from*, thus leaving it an open question whether he was guilty of theft or not. As Lord Gifford remarked, that in the Justiciary Court to Marr himself made no difference, and under whatever name it was called, his crime would have been visited by a similar punishment. "I am bound to say," his Lordship added, "that the mode in which James Marr acquired possession of the watches and jewellery in question was not, in the strict sense of that term, by theft. I say in the strict sense of that term, for I do not forget the thin and shadowy lines which distinguish theftuous possession from possession obtained by fraud, or from possession obtained for mere custody or carriage, converted theftuously and criminally to the possessor's use. I think it is enough to decide in the present case that Marr's possession was not theft in the strict sense of that term—not theft in the sense that attaches a *vitium reale* to the subject itself into whose hands soever it may come." The Sheriffs in Glasgow both shelved all difficulties and avoided troublesome questions by simply holding the act to have been theft, but the Court did not countenance this mode of cutting the Gordian knot, as we see from the opinions of all the judges. The contention of the wholesale dealers was that this was "sale on approbation," not "sale and return," a contract with very different effect. It means that the articles are sent "on approbation," that is, for examination, to the proposed purchaser, who may retain at the prices named by the sender such of them as he approves, or all of them, or none of them, those not taken, if any, being returned at once. Now, as one learned judge remarked, "this is quite a different contract from sale and return, and has in some respects different effects. Both may be considered as conditional sales, but the conditions are different. In 'sale and return' the condition is that the consignee shall only buy what he succeeds in selling at his own hand, at his own risk, at what price, and at what credit he pleases, and reasonable time must be allowed him to do this. In 'sale on approbation,' on the other hand, the condition is that the consignee himself shall instantly or within reasonable time examine the goods and declare his own approbation or disapprobation thereof, which will then fix whether there is to be sale or not. Purchase by a third party is no part of this contract, and reasonable time for examination only is all that the

receiver can ask." The Court came to the conclusion that it was the former and not the latter contract that was entered into with Marr. No doubt in some cases Marr had made representations that watches were required by him for certain specific objects, for presentations, etc., and it was urged that this pointed to a different kind of contract from "sale and return," and indicated that only one watch was sold, the rest being to be returned at once; it was a very special bargain according to this contention. It was, however, pointed out that there was merely a fraudulent representation by Marr to help in obtaining the watch, and that there was nothing in the arrangement under which he got them to prevent more watches than the one being sold. It is probably unnecessary here to refer to the authorities cited, but we may notice in passing the case *ex parte White re Nevill* (Law Rep. 6 Chan. App. 397), where a similar result was attained, and (upon the question of theft) the case of *Cowan* (8th January 1859, 3 Irv. 312), where a person got a watch on trial, if approved, the price to be paid on a certain day; if not, the watch to be returned. He sold the watch on the morning of that day, and never paid for it. This was decided to be a breach of contract and not a theft.

In the case of *Hannan and Hair v. Henderson* (Dec. 16, 1879, 17 Scot. Law Rep. 236) a distillery partnership existed in which it was stipulated by the contract that on the "bankruptcy or declared insolvency" of any one partner, he should cease to be a partner. One of the partners got into difficulties in another business in which he was sole partner, and sent to his creditors a circular letter announcing that he was "obliged to suspend payment," calling a meeting of them, and asking for "indulgence with regard to any acceptances becoming due." The creditors ultimately agreed to accept 10s. in the £. He, however, refused to acknowledge that he had ceased to be interested in the distillery, and they brought an action of declarator that the partnership in that concern *qua* him had terminated. The Court gave effect to the pursuers' contention that there had been "declared insolvency," and refused to permit a conventional irritancy based upon a reasonable and non-penal stipulation to be purged at the bar.

*Marshall v. The School Board of Ardrossan* (Dec. 10, 1879, 17 Scot. Law Rep. 243) is a case the name of which has in various shapes adorned the rolls of Court for some years. The decision on the last occasion on which it was dealt with by the Inner House has fixed that where a resolution is come to by a school board dismissing a teacher, the antecedent circumstances may be inquired into by a court of law, not with any object, however, save that of fixing the amount of retiring allowance to which the dismissed man is entitled. Where the averments, as in this case, amounted to charges of oppression by the school board, the teacher will be allowed to prove them. The Lord Justice-Clerk, however, considered that no right to any retiring allowance whatever existed when a teacher

was dismissed for fault, and his Lordship based this opinion upon the statutes of 1861 and 1872.

A somewhat curious point arose in *Cumming and Others v. Maxwell* (March 2, 1880, 17 Scot. Law Rep. 463), where a tenant took a house on the express stipulation that the drains, etc., were to be put in thorough order at the sight of Dr. Stevenson Macadam. The drainage system was condemned by that gentleman, and in consequence of the extensive repairs necessary the tenant did not get entry until three weeks after the term. He accordingly refused to pay rent unless under deduction for that time, and the landlord sequestrated for non-payment, a mode of procedure which the Court unanimously found to be incompetent, and they recalled the diligence. While admitting the right of the tenant in the circumstances to compensation, the Court reserved any opinion as to the proper mode in which such a right should be enforced.

Lord Blantyre presented against the Clyde Navigation Trustees a note of suspension and interdict to prevent them carrying on any dredging operations *ex adverso* of his estate of Erskine. The case is reported in 17 Scot. Law Rep. 476, and judgment was given on March 5th. The lands between high and low water mark at that part of the river are the property of the complainer, but the Court held that the Clyde Navigation Trustees had a statutory right under sec. 76 and sec. 84 of their Act (Clyde Navigation Consolidation Act, 1858) to dredge at the place in dispute, reserving of course to the proprietor all claims of compensation for damages inflicted on his property by their operations.

The last decision to which we propose at present to refer is that of *Neill's Trustees v. W. Dixon, Limited* (March 19, 1880, 17 Scot. Law Rep. 496). This case was one of "surface damage" caused by the removal of minerals in a property near Glasgow. The owner of the whole estate in 1802 sold the minerals to one person, and the lands to another, whose titles, however, contained a reservation in favour of the mineral-owner to work the minerals on paying "all surface damage, if any shall be thereby occasioned to the ground of the lands." About 1818 a house and offices were built on the estate, there having formerly been only a few cottages, and in 1878 a subsidence caused by the working of the minerals injured the house. The Court decided that the old obligation of 1802 covered not merely the state of matters then existing, but the injury to the house. Whether or not an enormous addition to the weight on the surface might affect a decision of the Court in such a matter was a question which did not arise and was not decided. We may aptly conclude by quoting from Lord Gifford's opinion as follows: "The defenders contended that 'surface damage' only extended to damage caused by sinking pits or making roads or rubbish-heaps upon the surface, and did not extend to subsidence of the surface caused by underground workings. I do not think the provision can be so limited. All surface damage occasioned by the working is to be



paid, and the expression 'if any' seems to point to underground workings; for if the only damages contemplated were those caused by pits and roads, the words 'if any' would probably not have been inserted. Pits and roads always affect the surface. Underground workings may often be conducted so as to leave the surface uninjured. Hence the expression 'surface damage, if any,' occasioned by the working. . . . Apart from the special terms of the conveyance, I think at common law, where the minerals are conveyed separately from the general estate in the lands, the owner of the minerals must so work them as to have sufficient support for the surface. Now I think it proved in the present case that this has not been done. The subsidence of the surface was not occasioned by the weight of the buildings. It would have subsided, and to the same extent, though there had been no buildings on it at all, and the only materiality of the buildings is that they increase the damages which the subsidence has occasioned. But even though the weight of the buildings had been a material element, I think all plea on this head is barred by the fact that they are ancient buildings which have stood there for sixty years."

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## LIBELLOUS REPORTS OF JUDICIAL PROCEEDINGS.

(From the "*Irish Law Times*.")

"By the law of England a fair account of what takes place in a court of justice may be published, but the reporter who gives the account ought not to mix up with it comments of his own; and if any comments are made, they should not be made as a part of the report. The report should be confined to what takes place in court, and the two things, report and comment, should be kept separate." Such was the statement of the law governing the publication of legal reports as laid down by Lord Campbell in *Andrews v. Chapman* (3 C. & K. 286); but, by a case recently before the Court of Appeal in England, the generality of those expressions has been somewhat narrowed. Suits are familiar enough in our courts where privilege combines with fair comment and absence of malice to exonerate defendants who would otherwise be mulcted in damages; and, on the other hand, plaintiffs sometimes succeed on the point that, although the occasion be privileged and malice absent, the account is not what can be properly considered a fair one. But *Stevens v. Sampson* (5 Ex. D. 53, 41 L. T. N. S. 782) is, we believe, the first instance on record where the occasion was privileged, inasmuch as the subject-matter of the libel was an account of proceedings in a court of justice, the report fair and impartial, but the plaintiff held entitled to recover on account of the publication by the defendant being prompted by express

malice. The occasion of the action in question was a report sent to a local newspaper of proceedings in the Marylebone County Court taken for illegal distress. The report of these proceedings was sent by Sampson, the solicitor for the plaintiff in the county court action, and included statements given in evidence as to the conduct of Stevens, the debt collector of the plaintiff in that action. Thereupon Stevens sued Sampson for libel, and the jury found, in answer to questions put to them by the judge, that the report was a correct and fair report of the proceedings in the county court, but that it was sent with a certain amount of malice, and awarded the plaintiff forty shillings damages. The Lord Chief-Justice, upon those findings, ordered judgment to be entered for the plaintiff for that sum. The defendant appealed, and his counsel contended that, when the account was once found to be a fair one published in a newspaper, the question of malice or no malice was beside the issue, because otherwise the very same words furnished by two different reporters, where, as is often the case, they take notes one from the other, might in one instance be actionable and in the other not. And it would seem that the argument might be pushed still further, for if the same reporter furnished an identical report to two different journals, and the editor of one published with malice and of the other without malice, the former would be unable to avail himself of the plea of privileged communication which would be open to the latter. They likewise referred to the dictum of Lord Campbell in the case already mentioned, *Andrews v. Chapman*, and urged that "although it is possible that all that the Lord Chancellor said is not inserted, it is clear that the substance of what he said is inserted, and the privilege—a valuable privilege for the public—of publishing reports of proceedings in courts of justice, would be useless if it were necessary to set out every word of the evidence and of the speeches and of what was said by the judge. However, that is not necessary, if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it." Notwithstanding such arguments, however, the Court (Lord Coleridge, C.J., Bramwell and Brett, L.JJ.), without calling on the counsel for the respondents, gave judgment for the plaintiff. Lord Justice Bramwell explained the true principle to be that when a person relies upon a defence of a privileged communication he must show that he acted on that privilege—"It is no use in showing that the circumstances create a privileged occasion unless he shows that he acted under that privilege;" and he held that the verdict of the jury amounted to a finding that the defendant did not act under the privilege, that he was sending the report not for the benefit of the public but for his own purposes.

In the course of the discussion, the question arose as to whether the public periodical press has any peculiar privilege in publishing reports of legal proceedings. It has often been urged that such a

distinction does exist in favour of journalism, since the reporters only bring home to individual members of the public what the public have a right to hear in open court. It is obvious that should a reporter, in the discharge of such functions, supply to his paper a close approximation in a summarized form of what the public would themselves have heard if they had exercised their undoubted right of being in court, the presumption of malicious purpose is almost out of the question. At first sight it would seem, if the report be published not in the recognised organs of public opinion, but in a publication got up specially to give widespread currency to an individual case, no such ground for negating a malicious intent would arise, inasmuch as no such duty of informing the community of matters of general interest can exist in the case of an isolated print as in the case of a daily newspaper. Thus it was argued in *Milissich v. Lloyds* (36 L. T. N. S. 423) that a pamphlet issued by the defendants, containing an account of a trial in which the character of the plaintiff was involved, differed from ordinary reports of trials because the publication was not for the purpose of conveying information to the public, but for the benefit of the business of underwriters, and in support of this contention some expressions of Bayley, J., in *Flint v. Pike* (4 B. & C. 473), were relied upon, in which he stated that for a plea of justification to be good it was requisite that it should show the alleged libel to be "for the purpose of giving such information to the public as it was proper or requisite that they should have." The publication of cases heard in courts of justice was lawful "because it is useful to the public, but it does not thence follow that any person is at liberty to publish everything which occurs in courts of justice, or that he is at liberty to publish not only the whole, but even the part of a trial when that part is libellous on an individual." This opinion, however, met with no countenance in the Court of Appeal, Brett, L.J., saying that he could not agree that a report could not be privileged because it was not published by a newspaper, but by a private body, but that, as matter of law, the privilege was precisely the same in either case.

Another distinction was, however, taken, which it may be of importance for editors and publishers of public prints to bear in mind, with a view of keeping themselves out of the meshes of the law of libel, namely, the difference between a report furnished by the ordinary authorized reporter of a newspaper, and that supplied by a volunteer. In the case under consideration the report was sent to the publication by the solicitor of one of the parties to the action, the account of which it embodied, who was found by the jury to have been actuated by malice towards the plaintiff in the libel suit. The instance was put at the bar as an analogous one of a servant receiving a character from his master whose spoons have been stolen. In such a case, doubtless, in stating the fact of the theft in the character of the servant, the master

would be possessed of such an animus against him as would amount to legal malice; yet such a statement on the part of the master would not be actionable. But the distinction between the two cases was thus succinctly put by Bramwell, L.J.: "It must be taken in this case that the master is acting upon the request of the servant to give him a character, and so his statements, though made maliciously—that is, not only for the purpose of benefiting the inquirer, but also, or altogether, of injuring the servant—if honestly believed to be true, are privileged. If the master acted as a volunteer, by going out of his way to give the information, the case would be different. So in the case of the publication in a newspaper. . . . I do not think the public periodical press has any peculiar privilege. Would then the ordinary reporter of any periodical, who happens to bear malice towards a party to any legal proceedings, be liable to an action because he sends a report of that action, amongst others, to his periodical? I think not. There is a kind of duty to do it, as in the case of the master. He is not going out of his way. Such a case is different to that of an entire volunteer, as the defendant was here." This exposition may well be taken to heart on the one hand by publishers as a caution against printing matter furnished by outsiders, and on the other by masters who, often through ignorant apprehension, insert or omit vital statements in servants' characters, and thereby give detected thieves a fresh chance of committing depredation.

The privilege attaching to reports of judicial proceedings (which we further discussed in vol. xii. p. 467) was also considered in the case of *Lynam v. Gowing*, heard on demurrer before Fitzgerald and Dowse, BB., on the 21st April. It appeared that the defendant, a coroner, held an inquest, in the course of which the plaintiff was examined, and the alleged libel complained of in the statement of claim was that the defendant had furnished to the Right Hon. James Lowther what purported to be an account of the proceedings, in which it was stated that, when the plaintiff was giving his evidence on the occasion of the inquest, the Rev. Mr. Callery said, "That is nothing short of perjury." To this statement of claim the defendant had pleaded, first, that he had *bond fide* furnished a record to the Chief Secretary, who was interested in the matter; and, second, that the report was privileged, as it was a full and accurate report of the proceedings in a court of justice, published *bond fide* and without malice. To those defences demurrers had been taken, on the ground that the words in respect to which the action had been brought were not, in any sense, part of the proceedings. Fitzgerald, B., said that it seemed to him that the only interest that was shown to exist in Mr. Lowther, whether regarded as a public official or as a member of Parliament, and Chief Secretary to the Lord Lieutenant, was to know the proceedings that took place before the coroner on this inquest. No interest to justify the

plea of privilege had been exhibited, especially as regarding the necessity of his knowing the opinion of the Rev. Mr. Callery. Dowse, B., said that the words complained of, which were not part of the proceedings of a court of justice, clearly imputed the crime of perjury to the plaintiff. It would be hard to say that the defendant published them for the public good, inasmuch as he simply made Mr. Lowther the depositary of his information. Every report emanating from a recognised reporter would be held privileged, as his duty was to inform the public of every matter concerning their welfare. But it was absolutely necessary to show an interest in the communication, and not merely an interest in making that communication. What interest had Mr. Lowther or any other person of the whole human race in hearing the Rev. Mr. Callery's opinion upon this subject? It was quite clear that no privilege existed. The demurrer was allowed accordingly.

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### Reviews.

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*A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time.* By F. C. VON SAVIGNY. Translated, with Notes, by WILLIAM GUTHRIE, Advocate. Second edition, revised. Edinburgh: T. & T. Clark.

WE most heartily welcome a second edition of this valuable work, not more because pains well bestowed ought to be well rewarded, than because we have here a proof that labour beyond the limits of our municipal law is not unlikely to bring, besides mere *kudos*, something more substantial in its train. That a translation of a philosophical treatise by a foreign author, adapted to the wants of English-speaking jurists by means of notes, and brought down to date, should have gone out of print in the short space of eleven years is one of the pleasantest phenomena in our recent legal literature that we are able to recall. The secret probably lies in the hint, which the translator lets drop in his preface, that the first edition had been received with great favour in England and America.

The reason for this favour is not far to seek. The original is good sound work, and the version is nearly as good as is possible in "doing" law German into English. It is a positive relief to turn from the older Continental writers on Private International Law, and from their modern imitators, of whom Story is the chief, to the pages of Savigny. Story's "Conflict of Laws" is probably the worst book that was ever penned by a competent jurist. It is little more than a jumble of "probable opinions." A new Pascal might find an excellent text for a new series of "Provincial Letters" in page after page of doctrines which are impartially adapted for the use



of counsel on both sides of a case. Where Story fails, Savigny succeeds; and his success is a striking tribute to the importance of a study of the Roman jurisprudence as a lesson in method. Nothing could at first sight be more clear than that the Roman law was the very last place where one could expect to find authority on international law. At the date of the great classical jurists the Roman Empire was actually, and at Justinian's time was nominally, coextensive with the whole civilized world; and that not by way of federal agglomeration, but by way of complete solidarity by law and in fact. Thus, for example, nothing can be more unlike our modern notions of the meaning of the law terms—origin and domicile—than their signification in the *Corpus*. There *origo* means citizenship of an urban community within the empire, and is acquired by birth, adoption, manumission and allection, or the gift of a burgess ticket; and *domicilium* means attachment to an urban community by means of definitive abode within its territory. And both are mixed up with peculiarities of the Roman *municipia*, which have no more application at the present day than the laws of Draco. Yet out of these unpromising materials the genius of the prince of modern jurists has framed what is distinctly the most valuable treatise on international law in existence. This is the work which, extracted from the noble but unfinished "System of Modern Roman Law," is here presented in an English dress, adorned but not overladen with modern English and Scottish trimmings.

When Mr. Guthrie's book first appeared in 1869 we took the opportunity of noticing and recommending it to the legal public at considerable length (vol. xiii. p. 134). There seems to be little if any alteration in the text of the present edition. The translator has not seen fit to give effect to our hints regarding some of his versions. It cannot be wholly concealed, however excellent the translation, that there must necessarily be some uncouthness in transferring bodily into our too frequently slipshod English nomenclature the accurate, if over-ponderous, German legal terminology. The new matter is contained in the notes, which bring down the English and Scottish (but not, so far as we have been able to find, the American) decisions to the present date; and in the short extracts from the works of Bartolus, Molinaeus, Paul Voet, and Huber. These are printed in the original; and much irksome labour is spared the student by the addition of the modern form of citing passages in the *Corpus*. It would have been no loss if this improvement had superseded and not merely supplemented the cumbrous old mode. The book closes with a sketch of Savigny's life and labours, which was contributed by Mr. Guthrie to the *English Law Magazine* in 1863. Why should it be that printers should maltreat the German tongue more ruthlessly than any other European literary language? In this revised edition of a work which contains only a few German words here and there,

errors of the most obvious kind will be found by the curious on pages 108, 125, 311, 331, 528, 531, 532. We hope that we may not have long to wait for the third edition, to which Mr. Guthrie is already looking forward, and that it may fulfil the wider scheme of exposition which he then promises to the student of international law.

*Digest of Decisions relating to the Poor Law of Scotland, with Decisions under the Lands Valuation, Public Health, and Education Acts; with relative Statutes.* By JOHN ALEXANDER REID, M.A., Advocate. Edinburgh: Duncan Grant. 1880.

IN these days, when every subject and wellnigh every branch of a subject is treated as a specialty, it is not surprising to see the decisions relating to the Poor Law arranged and classified in one volume. There is a particular fitness in thus treating them, as the subject to which they refer is one which is studied by and concerns many persons who do not know and who do not need to know any other branch of law than that relating to the support and treatment of the poor. Mr. Reid has made a compendium of cases which we doubt not will be found of great use to inspectors of poor and others in similar situations. He has collected together about four hundred cases, and arranged them in sections, each under an appropriate heading. What funds are applicable for the support of the poor is the first point treated of, and that is followed by cases in connection with the administration of the funds, officers of the parochial board, assessment and valuation, exemption from poor-rates, etc. We have then a collection of useful English cases on valuation and assessment, after which come cases relating to persons entitled to relief, and the nature and sufficiency of such relief. As might be expected the section devoted to cases dealing with the subject of recourse occupies a considerable space; the insane poor are next treated of, and after them the important subject of settlement is productive of a large array of cases. The remaining sections deal with actions and judicial procedure, and cases under the Lands Valuation, Public Health, and Education Acts. After the digest proper is concluded we have no less than three hundred pages taken up with various statutes constituting the poor law of the country, together with other Acts relating to kindred subjects. A comprehensive index of subjects and a less satisfactory one of cases are appended to the volume.

There is no doubt that this collection of cases will prove of much practical value to those for whom it is chiefly intended. The cases seem to have been judiciously selected, and both the facts and the statements of law are clearly yet tersely set forth. In most of the cases an extract is given from the observations of the judge who delivered the leading opinion. The cases are, with the exception of the English ones, all such as have been decided in the Court of

Session, and reference is made in each instance not only to the authorized reports, but also to wherever the cases may have been reported. We confess to some feeling of regret that the editor did not think proper to include in the digest such Sheriff Court cases as have been reported, and which touch on points which have not come under the notice of the Supreme Courts. Several such have been reported from time to time in the pages of this magazine and elsewhere. Though not, properly speaking, authorities, such cases often contained much useful information and discussion of various points under the poor law; they would not have taken up much space, and would have formed a useful feature in the book. As it is, however, we have much pleasure in recommending this digest "to all whom it may concern," as a carefully-compiled and lucidly-arranged work.

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### The Month.

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*Report of the Committee of the Faculty of Advocates on "A Bill to amend the Laws relating to the Property of Married Women in Scotland."*—This Bill is one of the most important in regard to the law of Scotland that has been introduced into Parliament in recent years. It was only at the end of last week that information was obtained that such a Bill had been laid before the House of Commons, and it was not till Tuesday, 8th June, that copies of the Bill were obtained by the Faculty of Advocates. Notwithstanding the important change which this Bill proposes on the law of Scotland, it was set down for second reading in the House of Commons on Wednesday, the 9th of June, and the second reading was carried without any legal body in Scotland having an opportunity of pronouncing an opinion upon it. The Committee regard such a mode of hurrying through a measure of so great importance as very unusual. Hitherto all such Bills, having the great significance of this one, have been laid before the country, and the various legal and municipal bodies invited to give it their deliberate consideration before the step has been taken of a second reading. The measure certainly does not commend itself to favour, when, contrary to this time-honoured practice, the second reading of the Bill has been carried in the House of Commons without the people in Scotland knowing what is its purport.

The purport of the Bill is certainly of the very greatest interest, and it may be necessary for the Faculty to take the decided step of presenting petitions to both Houses of Parliament, so as to ensure that there shall be in this matter no crude and hasty legislation.

This Bill proposes to change the law of Scotland in the following particulars:—

1. That the *jus mariti* and right of administration of husbands be abolished.

2. That these rights shall be abolished not merely with regard to natives of Scotland domiciled there, but foreigners who may have

married under a different law, and who shall become domiciled in Scotland.

3. That a married woman, being the owner of heritable estate, may sell it without the consent of her husband.

4. That she may borrow money over such heritable property, and grant bonds therefor, without the consent of her husband.

5. That she may institute any suit or action, in regard to her heritable estate, without the consent of her husband.

6. With regard to people who were married before this Act passed, the *jus mariti* is to be excluded with regard to all property that the wife may acquire right to hereafter.

7. With regard to such people married before the Act passed, they are allowed to declare, by mutual and *irrevocable* deed, that the wife's estate, including such as had previously come to the husband in right of his wife, should be excluded from the *jus mariti* and right of administration. It will be observed that after the parties have put their signatures to this deed it is to be *irrevocable*. The property now enjoyed by the husband in virtue of his *jus mariti* is thus to be given back to his wife, and cannot be recalled as a donation, because the gift is to be *irrevocable*.

These are provisions in favour of the wife. There are, on the other hand, two provisions which mitigate somewhat the one-sided character of this legislation.

It is provided:—

8. That when the *jus mariti* is excluded the husband and children shall, on the wife's death, have the same rights to participation in the estate so excluded from the *jus mariti* as the wife and children would have, in the moveable succession of a husband, in like circumstances. That is to say, that if there be a surviving husband and surviving children, the husband shall get a third of the wife's personal estate, the children another third, and the remaining third is to be at the wife's disposal by will. The husband, however, is not to obtain a third of the rents of the wife's *heritable* estate, which *she* enjoys under the name of *terce*, when she is the survivor. The courtesy of the husband is not equivalent to this, because that right only extends to a limited kind of heritable property, and is not claimable when the husband is not the father of an *heir* to the property. The surviving husband of a childless marriage, in short, gets nothing from the wife's heritable estate by this Bill.

9. The other modification is contained in the sixth clause of the Bill, which enacts that the wife's separate estate shall be liable for debts "arising out of the domestic expenditure of the spouses, by whomsoever incurred." But it is carefully provided that the wife's estate shall not be liable until the husband's estate has been exhausted or is not available. We shall have occasion to refer to this matter in the sequel.

This certainly is an Act of Parliament of a very drastic and sweeping character, and which makes a complete overturn of the principles upon which the law of Scotland in regard to husband and wife is based. The Committee are in no ways desirous to be understood as upholding the law of our country, in regard to the rights of property of married persons, as perfect. On the contrary, they think that the time has come for well-considered modifications upon the existing system; and, if they understand the temper of their brethren, the whole Faculty of Advocates

concur in this opinion. The Faculty have, indeed, in recent years, been the promoters of various measures for the amelioration of the law of husband and wife, which have proved very successful in practice. They think, however, that before a change so great as is now proposed should be submitted to the Legislature, there should have been somewhat more of consideration given to the subject, and the opinion obtained, as to the best mode of regulating the rights of husband and wife in their properties, of a Commission which could deal with the laws of the two countries, and bring them in this matter into harmony. The interests involved are so great, the persons whose interests are affected are so numerous, the law upon the subject is so ancient and settled, that changes made upon it should be done not by mere sudden and haphazard legislation, but after a deliberate inquiry as to the working of the law in other countries besides our own.

In reference to the particular Bill upon which the Committee have now to report, they beg to call the attention of the Faculty to the great misapprehension that exists, in regard to certain matters, arising from the difference between the laws of Scotland and of England.

The Committee know that there is before Parliament a Bill to increase the rights and privileges of wives according to the law of England. How far these may be extended the Committee do not know; but it seems that this difference between the two systems of laws has been, by the supporters of the present Bill, totally ignored. It is necessary therefore to recapitulate shortly these differences.

According to the law of Scotland the husband is tied up, as regards both his personal and heritable estate, in a way that a husband is not by the law of England. By the latter law a husband is the master of his own estate, entitled to will it away as he pleases, while at the same time he has, what a husband has by the law of Scotland, a right to all the personal property of his wife. But, on the other hand, the restrictions upon a husband and father by the law of Scotland are as follows:—

1. A widow is entitled as of right to one-third of her husband's personal estate if there be children of the marriage; and to one-half if there be no children. This right, called *jus relictæ*, the husband cannot bar, by any deed of his.

2. The children are entitled to one-third of the personal estate if there be a widow, and to one-half if there be no widow. This right, called *legitim*, the husband cannot bar, by any deed of his.

3. The widow is entitled as of right to one-third of the rents of the heritable estate of her husband under the name of *terce*. This right he cannot bar, by any deed of his.

Thus the whole personal estate over which a husband by the law of Scotland can test, or make a will, is one-third thereof.

All this is very different according to the law of England. According to that law, a husband and father can dispose of his personal estate as he thinks fit; and as regards his heritable estate the husband is entitled, at his pleasure, to bar her right of dower (equivalent to *terce*), according to the enactment in 3 and 4 Will. IV. cap. 105, sec. 4, as follows: "And be it further enacted that no widow shall be entitled to dower out of any land, which shall have been absolutely disposed of by her husband in his lifetime, or by his will." Farther, when a wife dies intestate, the



husband succeeds, by English law, to her whole personal estate, instead of to one-third as is proposed for a Scottish husband.

It is thus very clear that it is not quite accurate to argue from the one law to the other, and to say that what would be reasonable in the way of restriction of a husband's rights as regards the law of England, should be equally reasonable as regards the law of Scotland. If the husband's powers over his own property were the same according to the law of Scotland, as they are according to English law, the injustice of the proposed legislation would not be so clamant; but while it is proposed to retain all the rights which the wife has in her husband's property—of *terce*, of *jus relictæ*, of freedom (till her husband's means are exhausted) from contributing to the common expenditure of the household from her separate estate, however great it might be—the case assumes a totally different aspect—more especially also when there is taken along with that, the fact that it is proposed to retain the right of the children to control their father, to the extent of a third or a half, for their *legitim*.

It is in consequence of these differences between the laws of the two countries, that the Committee desiderate that this whole matter should be reported upon by a Royal Commission, who should be called upon to state whether, as an equivalent for conceding to wives the absolute control of all moneys that they acquire, there should not on the other hand be given up the *terce*, the *jus relictæ*, the *legitim*, which now tie up the hands of the husband and father. With regard to the maintenance of the household, some members of the Committee are of opinion that, as a consequence of recognising the existence of separate estate in married women (which is of recent date in Scotland), the wives are bound at common law to contribute a proportion of the expense of the household. This is a point that has not yet been determined by the Courts; and this is a point that should be left open, but which will not be so, if the present Bill becomes an Act of Parliament. The wife, according to it, is only to be made liable to support her children and herself after the whole funds of her husband are exhausted, as certified by a "judge's order." This does seem exceedingly unreasonable. The Committee cannot understand what good, socially or morally, could be promoted by allowing a woman with a separate estate to spend it according to her vanity or caprice, or to save it up, while the whole of her husband's income is spent in providing for her, and for the maintenance and education of their children. The inevitable result of such a state of the law would be to create estrangements and family quarrels, and, instead of promoting, would defeat the happiness and comfort of the household.

The general question raised by this Bill is so grave and important that the Committee do not intend to weaken the expression of their opinion by commenting on details. They will only notice two in the first section, which violate the rules of international law, in declaring, *First*, That if either the man or woman at the time of the marriage be domiciled in Scotland, the *jus mariti* shall be excluded; the rule of international law being, that this matter is determined by the domicile of the husband at the time of marriage, so that if the husband were domiciled in a country where the *jus mariti* were allowed, that right would take effect, although he married a Scotch woman domiciled in Scotland at the date of marriage. *Secondly*, Another rule of international

law is violated in this section when it provides that if a husband who, at the date of his marriage, was domiciled in a country where the *jus mariti* prevailed, should afterwards come to Scotland and be domiciled here, the property which he had acquired according to the law of the domicile at marriage must be given up and become the wife's separate estate.

But it is unnecessary to dwell on these details in the presence of the general question which the Bill presents. In the States of America, where the rights of a wife have been recognised, to a greater or less extent in the several States, there was no such law as exists in Scotland of *terce*, *jus relictæ*, and *legitim*; and the wives in those States have been made subject to contribution for domestic expenditure.

In short, it comes to this, that if this Bill is to pass, it must be upon condition of conceding to the husband the same rights which he possesses by the law of England of being absolute master of his own property; and if this is not agreed to, then some middle course ought to be devised.

What the Committee recommend is, that the Faculty should use their influence to oppose the passing of the present Bill; that for this purpose they should present petitions to both Houses of Parliament, praying that it do not pass; and, further, praying that a Commission should be issued by the Crown to consider and report upon the law of property in regard to married women in the United Kingdom, with a view to assimilation; or, at all events, to report upon the law of Scotland, with a view to amendment.

EDINBURGH, 10th June 1880.

*Edinburgh, 12th June 1880.*—At a meeting of the Faculty of Advocates held this day, the foregoing report was unanimously approved of; copies thereof ordered to be sent to members of both Houses of Parliament; and petitions presented to both Houses in the terms and with the prayer suggested in the report. PATRICK FRASER, D.F.

*Report of a Committee of the Faculty of Advocates on a Bill to provide for the Appointment of Judicial Factors by Sheriff Courts.*—The object of this Bill is stated to be to empower Sheriffs in Scotland to appoint Judicial Factors (meaning thereby factors *loco tutoris*, factors *loco absentis*, and curators *bonis*) in cases of estates of small value. The power of making such appointments has hitherto been regarded as part of the *nobile officium* or supreme equitable jurisdiction of the Court of Session. In England the analogous jurisdiction is, it is understood, confined to the Court of Chancery.

The Committee disapproves of the proposed measure, and is of opinion that the Bill ought not to pass.

I. The grievance assumed by the Bill to exist is the disproportionately large expense which is said to be involved in the present system of appointing Judicial Factors under the Pupils' Protection Act in cases of small estates. In regard to this, it may be remarked—(1) That the larger part of this expense, consisting of the cost of preliminary inquiries, reports, fee-fund dues, etc., must be incurred whether the application proceed before the Court of Session or in the Sheriff Court, so long, in fact, as judicial authority is required; and (2) That the whole cost of

carrying through such applications is in simple petitions about £10, in intricate petitions £20, and on an average about £15. It may be added that the substitution of correspondence between the Accountant of Court and the agents, instead of communication by personal interview, must necessarily cause delay and expense.

The question then comes to be, Whether, for the purpose of securing a slight saving on these small sums, it be worth while to risk the undoubted difficulties and dangers which are involved in the proposed change? (1.) It no doubt often, perhaps usually, happens that the exercise of this equitable jurisdiction is not a matter of much difficulty or anxiety; yet cases do arise of the utmost delicacy, more especially under applications for factors *loco absentis* and curators *bonis*; and in all cases the Court or Lord Ordinary has been in the habit of scrutinizing most jealously the statements of the petition. It is believed that there have been hitherto in the Sheriff Courts no such opportunities of dealing with *ex parte* statements, regarded as the foundation of a judgment *causa cognita*. (2.) The remedy of an application for a judicial factor is not only one which may involve matters of much delicacy, it is also an extraordinary remedy, instituted (like all those coming under the *nobile officium*, or supreme equitable jurisdiction) *ex necessitate rei*, where there is no other course possible or practicable; and all such extraordinary remedies have hitherto been confined to the Supreme Court. (3.) Much perplexity—which the Bill does nothing to clear up—will necessarily arise from want or conflict of jurisdiction. The petitioner and the ward may reside in different counties; the parties whom it is necessary or proper to call as respondents may reside in half-a-dozen more; a lunatic may be enclosed in an asylum remote from his former residence, and from those who know about his affairs; the ward may have heritable property in more than one county, and may reside in none of them; there may be more wards than one, and they may reside in different counties. In all these cases there is no difficulty in applying to and calling others before the Court of Session as the *commune forum*. It is not so certain that there will be the same convenience and publicity in the Sheriff Court of, it may be, a remote part of the country. (4.) In no part of its jurisdiction has the Court of Session been more careful than, in exercising its *nobile officium*, to proceed according to precedent and to preserve uniformity of practice. It has constantly been tempted to extend its powers for the sake of apparent expediency; and, even during the period at which the two Divisions of the Court sat upon summary petitions, differences of practice arose between them in spite of the frequent opportunities of conference among the Judges. Considerable inconvenience was the result. Since 1857 the combined result of reported cases, the traditions of practice, and office rules, has been a remarkable uniformity of practice in spite of continual changes on the Bench. It is obvious that in questions involving both property and status, this certainty in procedure, as well as in substantive law, is matter of the utmost importance; and that it is hopeless to expect anything of the sort throughout the many Sheriff Courts of the country. This danger seems to have been present to the mind of the framer of the Bill, who suggests a somewhat clumsy remedy in section 4, sub-section 7, by rule to be laid down by the First Division on report by the Accountant of Court. This rule, which is neither an Act of Parliament, nor an Act of Sederunt,

nor a decree of Court, is to be obeyed by the Sheriffs, without apparently becoming known to them in any particular way, as there is no provision for its promulgation.

II. The Committee now passes to the details of the Bill on the assumption that it will be proceeded with. The interpretation clause is mainly quoted from the Pupils' Protection Act. The leading enacting section provides for the appointment of judicial factors by Sheriffs and their Substitutes in cases of estates (heritable and moveable estate being taken together) of £100 a year or under, and for the exercise by the Sheriffs of the same powers and authorities over the factors as the Court of Session or the Lord Ordinary now exercises. In any view of the functions of a Sheriff the limit seems to be placed too high; and there seems to be no good reason for extending the proposed jurisdiction beyond estates of £50 a year or £1000 capital value. This is the actual limit of the new heritable jurisdiction conferred on the Sheriff in 1879; and it is the limit suggested by the Law Courts Commission in their Fourth Report (July 1870, page 31), in this matter of appointment of judicial factors.

Sub-sections 2 and 3 provide the mode by which the Sheriff is to satisfy himself of the value of the estate. His judgment on this matter is to be final, "and no such appointment once made shall fall in respect of it afterwards appearing that such yearly value did exceed one hundred pounds."

The Pupils' Protection Act is to be applied to the new factors, as required by sub-section 4. It will not be easy to do this, looking to the very different modes of procedure in the two Courts. In order to make the Bill at all workable the clauses of the Pupils' Protection Act intended to be applied should have been enacted specifically, and modified so as to suit Sheriff Court procedure.

There is provision in sub-section 5 for appeal from the Sheriff-Substitute to the Sheriff. Further appeal is neither allowed nor prohibited. It should be expressly allowed. The Accountant of Court is, by the same sub-section, bound to make reports to "a Sheriff-Substitute," just as he had to do to the Lord Ordinary, which is a provision of a rather novel description. The 7th sub-section, guarding against "diversity of judgment or practice," has been already referred to.

Finally, the Bill shirks difficulties of detail by authorizing the Court of Session to pass Acts of Sederunt of the amplest kind, going far beyond any powers hitherto conferred upon it as to making Acts of Sederunt. All the matters here handed over to the Court of Session should have formed part of the Bill, and thereby been made the subject of criticism before becoming law. The Bill next proceeds to fix the fees due to the fee-fund established by the Pupils' Protection Act. Increased salaries for the Accountant and his clerks, and new salaries for clerks, may be taken from the money thus paid into the fee-fund from the Sheriff Courts, and not, as ought to be the case, from the fee-fund generally.

The Bill is badly drawn. Some signs of carelessness in drafting, which appeared in the Bill as presented last session, have disappeared from the present Bill. It would still, however, be well in many places to make matters specific which are now vague and general, and will in consequence lead to litigation and expense in deciding points of form. Thus, for example, the leading section seems, contrary it may be supposed to the

intention of the framer, to give any Sheriff or Sheriff-Substitute in Scotland power and authority over a factor appointed by any other.

JOHN RANKINE, *Convener*.

*Edinburgh, 8th June 1880.*—The Faculty of Advocates having this day considered the foregoing report, approved thereof, and directed that the same be printed, and sent to members of both Houses of Parliament.

PATRICK FRASER, *D.F.*

*Report by the Sheriffs of Scotland on the Judicial Factors (Scotland) Bill.*—The object of this Bill is to enable Sheriffs to appoint Judicial Factors in cases of estates, the yearly value of which does not exceed £100—that is, estates the capital of which is equal to £2500.

The term Judicial Factor is defined to be “factor *loco tutoris*,” “factor *loco absentis*,” and “curator *bonis*.” The Sheriffs are of opinion that this increase of their jurisdiction is not called for by any evils or inconveniences that at present exist, that no saving of expense would result from this legislation, and that if such a measure is to be passed it ought to be put into a more workable shape than is presented by the present Bill.

1. The *first* class of officers proposed to be appointed are factors *loco tutoris*. It was not necessary to pass an Act of Parliament to enable the Sheriffs to appoint factors to manage the estates of pupil children, whose father is dead and who have not had appointed to them tutors or trustees for the management of their property. The Sheriff has already such power according to the existing practice, and a form of petition is given by Mr. Alexander in his “Practice on the Commissary Courts of Scotland,” part of which may be here quoted as indicating the way in which this branch of the practice of the Sheriff Courts is carried out. The petition narrates that the father and mother of certain pupil children are dead, “that the said children have not that status in consequence of their pupillarity which entitles and qualifies them to administer the personal estate of their said deceased father, and it therefore becomes necessary that a factor be appointed to them for the purpose of managing, ingathering, and administering the personal estate of the said deceased for behoof of the said pupils and all interested.” The prayer of the petition is to appoint the petitioner “factor on the estate of the said deceased for behoof of the foresaid pupils, with power to him to have himself decerned executor-dative to the said deceased *qua* factor foresaid on his estate; to give up inventory and expedite confirmation in his own name *qua* factor foresaid, and generally to enter upon the possession, management, and administration of the deceased’s estate for the use and behoof of the said pupils and all others interested therein on his finding caution for his intromissions with the said estate, and that the same shall be made forthcoming to the said pupils and all interested.” This form of proceeding is in use in the Sheriff Courts, and has been held to be competent and effectual by the Supreme Court (see *Johnstone v. Lowden*, 15th Feb. 1838, 16 S. 541). If, therefore, there was any necessity for allowing the Sheriff to make appointments of factors, that necessity is provided for already so far as regards at least the personal estate. If such pupils are owners of heritable estate of the value of £2500, this is just the kind of



case that ought to be reserved for appointment by the Supreme Court. The Sheriff's jurisdiction in regard to heritable estate is limited to property of the value of £1000.

2. The *second* class of officers whom the Sheriff is now to appoint are factors *loco absentis*, who are thus described by Lord Stair (4, 50, 28): "If any party succeed to an estate and be out of the country, to continue for a considerable time, and is perhaps ignorant of his interest, then, upon application of their relations, the Lords will appoint factors to manage until the party concerned constitute other factors." Since Lord Stair's time, factors *loco absentis* have been appointed where the property was personal funds. The Sheriffs are all of opinion that no such power of appointment should be conferred upon them. A person abroad may have property in different counties, and the domicile which he had at leaving his country may have been in another county than any of these. If the Sheriff is to appoint,—within whose Sheriffdom any heritable or personal estate belonging to the absent person is situated or exists,—which of three or four Sheriffs is it that can make the appointment? If domicile, again, be the ground upon which a Sheriff can make such an appointment, there may be, in the case of a person long absent, an expensive proof led before the fact as to the domicile can be ascertained. All these difficulties are avoided by allowing such appointments to remain with the Supreme Court, which has jurisdiction over all Scotland; and there seems no hardship in this, even assuming the expense in the Supreme Court in making such an appointment would be greater than when the appointment is made by a Sheriff. The absent person is alone interested in the matter, and the factor subsists only till he returns and appoints another factor.

3. The *third* class of officers are *curators bonis*. Now there are two kinds of *curators bonis* according to the Scottish law and practice, viz. *curators bonis* for *minors puberes* and *curators bonis* for lunatics. The former class have been rarely appointed by the Court of Session in recent years, because a minor who has attained to puberty may choose curators for himself. It is not incompetent for the Court to make such appointments, but practically the Court of Session have abandoned this part of their jurisdiction, and it is not supposed that it is intended to confer upon the Sheriff Courts a power which the Supreme Court has resigned. It is, in consequence, assumed that the *curators bonis* referred to in this Bill are *curators bonis* to lunatics. Now as regards lunatics, the Sheriffs have at present no power of appointing guardians, and in this respect the case is different from that of pupils left without tutors. If the expense were very much less in the Sheriff Court than what it now is in the Court of Session, such a new power as this conferred, upon the Sheriffs, might be of use. But when upon inquiry they find that the expense of appointment in both Courts would be nearly equal, they do not see any practical good that would result from disturbing a system which has hitherto worked well.

4. This leads to a consideration of the matter of expense, upon which some misapprehension exists, and a regard to which has been the inducement to the introduction into Parliament of the present Bill.

After the Judicial Factor is appointed, the whole subsequent proceedings are directed by the Bill under consideration to be the same,

under appointments made in the Sheriff Court, as under appointments in the Court of Session. The finding of caution, the annual lodging of accounts, the annual audit by the Accountant of Court, the applications for special powers, the reports necessary to be obtained from the Accountant of Court before these powers are granted, and every other detail of management are all to be in accordance with the "Pupils' Protection Act," just as they are when the Court of Session appoints the Judicial Factor. The expense of all these subsequent proceedings, therefore, is in both cases identical. The only difference in the matter of expense (if there be such difference) is in the original appointment.

Now that expense stands thus: In the Sheriff Court the expense of such an appointment we have ascertained, from our auditors, would be about £7, which includes the expense of the petition, agency fees in presenting the petition, instructing the officer to execute it, intimations to relatives, and agency fees in getting the final decree. In the Court of Session the appointment costs about £10. In both cases it is assumed that the petition for the appointment is unopposed. Now of this £10 in the Court of Session, at least £3, 10s. could be saved by an order of Court. There are no less than £3, 3s. out of the £10 paid for printing the petition—a thing which is totally unnecessary to be done, and which could be dispensed with without any prejudice to the parties, or to the administration of the law. Another portion of the £10 consists of 10s., paid as fee-fund dues, which might be reasonably reduced to 2s., in regard to small estates; and if these two sums were deducted the expense in the Court of Session would be about the same as that in the Sheriff Court.

5. There are parts of this Bill which we cannot allow to pass without comment. It is very loosely drawn, and will impose upon the Sheriff Courts a burden which the framer of the Bill, by taking a little more trouble, would have relieved them of. He imports into the Bill the "Pupils' Protection Act," which is framed strictly in reference to Court of Session procedure; and further, he imports the practice before the Lords Ordinary, which is not a written code,—which, no doubt, the practitioners before the Lords Ordinaries are acquainted with, but with which Sheriff-Substitutes are not. Some of them, indeed, have never practised in the Court of Session, not being advocates. Thus it is enacted that after the appointment of judicial factors, the proceedings shall "be conducted as nearly as may be in the same form and manner in which proceedings under the recited Act are conducted before the Lord Ordinary," and more particularly it is enacted that "proceedings in the fixing of caution, in applying for special powers, in the auditing of accounts, in the exoneration and discharge or removal of judicial factors, and all other proceedings necessary for the management of the estates dealt with under this Act, shall be taken in the Sheriff Court, in as nearly as may be in the same form and manner in which the like proceedings are taken before the Lord Ordinary." Again, in all cases where the Accountant of Court is "bound to make any report to the Lord Ordinary in the Court of Session, he shall be bound in the like case to make his report to a Sheriff-Substitute." Therefore a report to the Sheriff would be incompetent. Hitherto the law has been that what the Sheriff-Substitute can do the Sheriff can also; but this is here reversed. The form employed in all the statutes up to this time is to state in the interpretation clause of a

statute that the word "Sheriff" includes Sheriff-Substitute, and this is the form that should be followed here. There is an appeal allowed from the Substitute to the Sheriff, but nothing is said of an appeal from the Sheriff to the Court of Session; and as that is not expressly excluded, such an appeal will be held to subsist, although perhaps this is not intended.

The clause in section 4, sub-section 7, giving authority to the First Division of the Court of Session, when "there is a diversity of judgment or practice in proceedings in judicial factories in Sheriff Courts, to lay down a rule to secure uniformity of judgment or practice," is one of a very anomalous description. If this means that any diversity on points of law in the Sheriff Court is to be made the subject of a rule by the First Division of the Court of Session, not in the shape of an appeal from the judgment of a Sheriff, and without any argument from the Bar, then it is very clear that it is a power which the First Division will never exercise. If it mean anything more than the framing rules of procedure, *that* is sufficiently provided for by the 5th section, which authorizes the whole Court of Session, and not merely the First Division, to pass Acts of Sederunt.

In short, if any extension of the powers of the Sheriff in the direction indicated in this Bill is to be carried out, it ought to be by a Bill more carefully drawn, and not by wholesale importation of other Acts of Parliament directed to a different procedure altogether. The framer of the Bill must take the trouble to set forth the practical machinery of his measure, and not leave room to future useless litigation by throwing the whole duty of clearing the way upon rules to be issued by the First Division of the Court of Session made upon a report by the Accountant of the Court of Session. There is no obligation upon the latter to report, and there is not the slightest hope that the First Division of the Court will ever *ex proprio motu* intervene in the matter.

6. Some of the Sheriffs cannot agree entirely with the above Report. Had Sheriffs under the decisions in *Johnstone v. Lowden* (15th Feb. 1838, 16 S. 541) and *Drysdale v. Lawson* (11th March 1842, 4 D. 1061) undoubtedly had the power to appoint persons to take charge of unprotected estates for their management and preservation, no such Bill as the present would have been required. But the last Law Courts Commission, with Lord Colonsay at its head, reported (12th July 1870) that "the power of appointing tutors, *curators bonis*, and judicial factors has hitherto belonged exclusively to the Supreme Courts," and recommended that, "in regard to small estates, there would undoubtedly be a convenience in allowing these appointments to be made by the Sheriff. . . . All such officers when appointed should be under the superintendence of the Accountant of Court. Where cautioners for such officers appointed in a Sheriff Court are not resident within the jurisdiction of the Sheriff, it will be necessary that they bind themselves to submit to his jurisdiction."

In this state of legal opinion as to the Sheriffs' present jurisdiction, the dissenting Sheriffs approve of the principle of the present Bill.

They are, however, of opinion with their brethren that factors *loco absentis* should not be embraced in it. It is difficult to see legal grounds for holding absentees to be subject to a Sheriff's jurisdiction, which is territorial and limited.

Difficulties as to the jurisdiction in cases of lunatics, minors, and pupils arise equally in applications to the Sheriffs for sequestration. These have been dealt with in the Bankruptcy Statute of 1856, and provisions should be introduced into the present Bill regulating this matter, on similar principles to those of section 19 of 19 and 20 Vict. cap. 79.

The prorogation of the Sheriff's jurisdiction over cautioners for judicial factors should also be provided for in the Bill, in accordance with the suggestion of the Law Commissioners.

The clerical error or omission in section 4, sub-section 5, which provides that the Accountant shall be bound to report, but only to the Sheriff-Substitute, should be altered so as to make the Accountant bound to report to the Sheriff, including therein "Sheriff-Substitute."

Sub-section 4 of section 4 is not made to embrace the Act of Sederunt of 13th February 1730, to supplement which the "Pupils' Protection Act" was passed. As this is a most important Act of Sederunt, the omission should be remedied. GEO. MONRO, *Convener of Sheriffs*.

EDINBURGH, 8th June 1880.

*The Law of Armorial Bearings in Scotland—The effect of Desuetude on Statutes.*—The *Law Magazine and Review*, in commenting on an article in the *Contemporary Review* by Mr. James T. Mackenzie, has these remarks: "The writer's allusion to a felicitous phrase of Sir James Stephen, reminds us of some curious anomalies in the shape of survivals—leg-bones, as it were, of long extinct legal Dodos—which still remain on our Statute-Book, the Revision Commission notwithstanding. It may be said that being mere survivals they are harmless pieces of national conservatism. None the less do we think that they are well entitled to be called 'Blunderbusses of the Statute Law.' If they go off, even by accident, they may very well hit the wrong person, and cause a deal of mischief. Take, *e.g.* the Act 1672, c. 21, the latest regulating the Law of Armorial Bearings in Scotland, and which is in the nature of a revival of the Act 1592, c. 125, for the same purpose. By the earlier Act, as recited in the later statute, power was given to 'the Lyon King of Armes, or his Deputies, to visite the whole Armes of Noblemen, Barrons, and Gentlemen, and to matriculate the same in their Registers, and to fine in one Hundreth pounds [Scots, this must be, fortunately, not Sterling, and so expressed in 1662, c. 53]; As also to escheit all such goods, and geir as shall have unwarrantable Armes ingraven on them.' This is strong enough, it might be thought, but the present Lyon, we believe, claims a further power, not recited or conferred in the Act 1672, viz. the power of imprisonment, which did form part of the Act 1592, and which has a very important bearing on the question of the progress of Liberty in this country. On reference to the Act 1592, we find that the power of imprisonment therein conferred, and which was not reconferred in 1672, appears to be grammatically connected with a special case. The Lyon is to 'put inhibition to all the commoun sort of people nocht worthie be the law of armes to beir

ony signes armoriallis, that nane of them presume or tak vpoun hand to beare or use ony armes, in tyme coming, vpoun ony their insicht or houshald geir, vnder the pane of the escheating of the guidis and geir, sa oft as they salbe fund contravenand this present Act, or whaireuir the same armes salbe found grawin and paintit, to owr souerane lordis use; And lykwayis vnder the pane of ane hundreth pundis to the vse of the said lyoun and his brother herauldis. And failzeing of payment thair of, that thay be incarcerat in the narrest prissone, thairin to remane, vpon their awin chargis, during the plesour of the said Lyoun.' That such arbitrary powers, not conferred by the later statute, and therefore, we hold, not re-enacted, should still be capable of being put forward, even as a mere '*brutum fulmen*' in these days, when the imprisonment of clergy who refuse to obey 'monitions' has not met with anything like general approval, is certainly a strong confirmation of the doubts expressed by Mr. Mackenzie concerning the advance of true Liberty. We are of opinion, on the whole, that Lyon never had the power of imprisonment, except for 'the commoun sort of people nocht worthie be the law of armes to beir ony signes armoriallis,' and whose use of them was consequently a distinct usurpation. Over noblemen, barons, and gentlemen, we conceive, the Lyon never had any power of imprisonment. For they, even in the case of their arms not appearing to have been registered, could doubtless prescribe a right to arms, and presume a grant from the Sovereign if they could not show a grant from the Lyon. This is the position, we cannot question, of many, at the present day, whose arms or differences are not on the Lyon Register. And it is important to bear in mind that it is out of the power of Lyon to prove the negative, *i.e.* that the said arms or differenced coats were never registered. For there is an acknowledged gap of more than a century (1542 to 1672) in the Records of the Lyon Court, and it is quite certain that many coats must have been registered during that period, which for that very reason are not found on the Registers subsequent to 1672. 'During the first fifty years of that long period,' says Mr. Seton in his standard work on the *Law and Practice of Heraldry in Scotland* (Edinburgh, 1863)—of which it were much to be wished that he would bring out a second edition—'there was no legislative enactment on the subject of armorial bearings, which may perhaps sufficiently account for the absence of a Record; but armed with the distinct and simple [perhaps rather too simple!] provisions of the Statute of 1592, surely the Lyon King of that period could not have failed to compile an official Register of Blazons.' Whether he did so or not, however, we remain of opinion that it would be a blunder of the gravest character for the existing Lyon to suppose himself vested with a power of arbitrary imprisonment, 'during plesour,' of any person, whether nobleman, baron, gentleman, or of the 'commoun sort of people,' whose coat armorial may not be found on the imperfect



pages of the surviving Lyon Registers. Were it otherwise, we should have here a most perfect example of the 'Statute-Law blunderbuss.'

The writer of these remarks does not seem to have been aware that in Scotland we have a tolerably certain safeguard against the dangerous effects of any mere "survivals" of a former legislative epoch, and one which prevents any awkward kick being given by the "leg-bone of an extinct legal Dodo." We have a principle which puts out the priming of the "blunderbusses of Statute Law" left in disuse for centuries, and does not permit of their going off by accident. In our country a law becomes obsolete by mere disuse for a lengthened period. In England it does not. There a law requires express repeal, as was happily instanced in the famous case of *Ashford v. Thornton* in 1819, when the operation of the English principle had the effect of saving a man's life. He was a murderer. Thornton, the murderer, claimed the ancient privilege of trial by battle and was found entitled thereto. The challenge was not accepted by the prosecutor, he no doubt thinking it was not a fair game in which he had to stake a good shilling against a bad one. Consequently Mr. Thornton was gathered to his fathers in the ordinary routine way and without the intervention of Jack Ketch.

We think that all persons, gentle or simple, whether they be "noblemen, barrons, gentlemen," or whether they be of "the commoun sort of people"—the souters of Selkirk as well as the Earl of Hume—may possess their soul in quietness, free from any apprehension of either the Statute 1592, c. 125, or the Statute 1672, c. 21, coming in a Rip van Winkle way to disturb their serenity and cause them to be "incarcerate in the narrest prissone upon their awin chargis during the plesour of the said Lyon."

*The Savigny Foundation.*—We are requested to state that the Social Science Association have received from the President of the Juristic Society of Berlin a communication in reference to the prize of 6900 marks to be offered in the year 1882 for an essay on "The Formulæ in the Perpetual Edict of Hadrian, in their Wording and Connection." The Savigny Foundation is a fund subscribed in commemoration of the great lawyer, Von Savigny, the interest of which is applied every two years in a prize for an essay on a legal subject, the adjudicators being the Imperial or Royal Academies of Sciences of Vienna, Munich, and Berlin, in rotation. The competition, from which only the ordinary home members of the Royal Bavarian Academy are excluded, is confined to no nationality. The essays, which must be written in Latin, German, English, French, or Italian, must be sent in by the 28th March 1882, addressed to the Royal Bavarian Academy of Sciences, and bearing, instead of the author's name, a motto, repeated in a closed envelope containing the author's name. Further particulars may be had on application at the office of the Social Science Association, 1 Adam Street, Adelphi, W.C.

# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF LANARKSHIRE.

Sheriffs CLARK and GALBRAITH.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY v. JAMES KERR AND COMPANY.

*Terminal charges for special services at junction of private branch with public railway, and for use of railway company's waggons off their line.*—In this action the Glasgow and South-Western Railway Company sued Messrs. James Kerr & Company, iron merchants, Glasgow and London, for £20, being the charges incurred to the pursuers by the defenders for the carriage of 100 tons of iron rails, at the rate of 4s. per ton, from Ayr Harbour to the Dalmellington Iron Company's Works near Waterside Station. The distance exceeded fourteen and was under fifteen miles, and the maximum mileage rate chargeable under the pursuers' Special Act is 3d. per ton per mile, but the Act contains the ordinary clause authorizing charges for terminal services. The pursuers neither loaded nor unloaded nor furnished any station accommodation, but they allowed the defenders the use of their waggons off the railway for the purpose of loading and unloading and carrying the traffic to and from the pursuers' railway. The pursuers also furnished and maintained the signals at the junction of the Dalmellington Iron Company's private branch with the public railway, and worked the signals and switches.

The pursuers claimed to charge in excess of the mileage rate in respect of these services, and the defenders objected to pay more than the bare mileage rate on the ground that such special services were merely incidental to the carriage, and consequently covered by the mileage rate.

The Sheriff has decided that the pursuers were, in the circumstances of this traffic, entitled to charge in excess of the mileage rate, and that the charge made is moderate. The following is the judgment :—

*“Glasgow, 4th December 1879.*—Declares the proof closed, and having heard parties' procurators, Finds that in this action, brought in the Debts Recovery Court, and remitted to the Ordinary Court on 7th July last, the pursuers ask decree for the sum of £20 as the amount of tolls and charges payable to them for the carriage of certain iron rails to the Dalmellington Ironworks, near the Waterside Station, on the pursuers' railway: Finds that in defence the defenders plead—(1) That the pursuers have failed to comply with the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845, sections 86 and 87, and that they are barred by section 88 from pursuing this action; and (2) that the account sued for is overcharged: Finds that the pursuers have instructed their case as set forth in the original summons, and that the defenders have not instructed either of their pleas upon record, therefore decerns against the defenders as libelled: Finds pursuers entitled to expenses.

“JAMES GALBRAITH.

*“Note.*—The Sheriff-Substitute fails to find any evidence that the pursuers have failed to comply with the provisions of the Act referred to. On the contrary, he is of opinion that the sections founded on by the defenders have no bearing upon the present case. A very long proof has been led, a great many documents produced and referred to, but the matter stands simply thus—that the pursuers did for the defenders the work of carriage which they now charge, and the charge is moderate. No doubt it was pled that the defenders were exceptionally treated. The Sheriff-Substitute thinks they have been exceptionally treated—the exception being altogether in their favour. It appears to him that all through the defenders have got from the pursuers every facility and concession that any trader could reasonably ask from a railway company.

“J. G.”

The defenders having appealed against the decision of the Sheriff-Substitute, the Sheriff-Principal has adhered in the following judgment :—

“*Glasgow, 3rd March 1880.*—Having heard parties’ procurators upon the appeal and considered the cause, For the reasons assigned by the Sheriff-Substitute, adheres to the judgment appealed against and decerns.

“F. W. CLARK.

“*Note.*—It is not now contended that the pursuers have failed to comply with the Act as to exhibiting a table of tolls chargeable, and having the milestones duly marked ; neither is it maintained that the pursuers are barred under the Act from charging for station accommodation. These pleas, though insisted on before the Sheriff-Substitute, are now withdrawn as being unfounded in fact and law. The question narrows itself to this—whether the rates charged are in terms of the Special Act, and whether the work charged for was in point of fact done. Upon these matters I do not think there can be doubt on a perusal of the evidence and a fair construction of the statute. The following cases may be referred to in support of the view I have now stated : *Watkinson v. The Wrexham Mold and Connahs Quay Railway Company*, 3 Neville & Macnamara, 177 and 178 ; *The Aberdeen Commercial Company and The Aberdeen Lime Company v. The Great North of Scotland Railway Company*, 3 N. & M. 214 ; *The Dunkirk Colliery Company v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 2 N. & M. 405 and 406. F. W. C.”

*Act.*—Andersons and Pattison.—*Alt.*—Laurence Thomson and Miller.

## SHERIFF COURT OF PERTSHIRE.

Sheriffs MACDONALD and BARCLAY.

CRICHTON v. DAVIDSON.

*Filiation and aliment—Effect of a decree in absence as a point in evidence.*—A defender was cited in an action of filiation and aliment. The service was at his dwelling-place. A decree was given in absence. A charge was given, and a year elapsed and another charge was given. The defender then reponed on the ground that he thought the action was not directed against him as he had an additional name. He was reponed, and after proof decree was pronounced against him. The following are the interlocutors :—

“*Perth, 4th May 1880.*—Having heard parties’ procurators and made avizandum, with process, proofs, and debate, Finds as matters of fact, *first*, the pursuer bore a male child on the day libelled ; *second*, the facts and circumstances fix on the defender the paternity of the said child : Therefore finds that in law the defender is liable with the pursuer in the mutual support of said child during the period libelled, and accordingly decerns in terms of the prayer of the petition : Finds the defender liable to the pursuer in the expenses of process : Allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and to report.

“HUGH BARCLAY.

“*Note.*—This is a very peculiar case. Had the defender entered appearance when summoned, the proof would have scarcely supported the pursuer’s claim, however strong the suspicion might be in her favour. The pursuer was the only female servant in the house, and the defender and a younger brother the only lads. The sleeping apartments of the parties were adjacent, and the pursuer’s bedroom door was unlocked. The pursuer’s testimony is quite consistent throughout, though certainly not corroborated, and in some minor points contradicted. But all her witnesses were of necessity drawn from the defender’s family, none of whom, under the former law of Scotland, could have been examined on her part. It is important to notice that the pursuer, before the

birth, informed the defender's mother of her state, and was immediately dismissed from her service.

"A letter was written to the defender informing him of the pursuer's state, which he refused to read, and therefore did not answer—more indicative of guilt than of innocence. The pursuer had three illegitimate children prior to the one in question. This, however, is rather against the defender, if in the knowledge of the fact, as he must have been. The pursuer was more likely to fall again with facility into the like lapse. It is most important also to observe that not the least suggestion is made of any other man paying attentions to the pursuer, or as to her keeping irregular hours. All these facts would go far to fix the paternity on defender.

"But the case is placed beyond doubt by the judicial proceedings in the case. The child was born on 13th October 1877, and the action was instituted on the 24th of the same month. The defender was cited at his father's house, but not personally. He admits he got the summons, but paid no heed to it '*because he had nothing to do with the pursuer.*' Surely this was just the reason why he should have defended the action. The other excuse of a cognomen being omitted is ridiculous. Decree was obtained against him in absence on 2nd November 1877, on which he was charged on 24th of that month. This charge defender in his reponing note omitted to mention, but states '*no claim was made on him for support of the child from October 1877 until the recent charge.*' Had the summons been served personally the decree would now have been, under the recent Sheriff Court Act, held a decree *in fora*, and as such final.

"Under the decree in absence the defender is now entered in the birth register as the father of the child, and should he be now assoilzied the entry falls to be corrected. Many a case of this class has been decided chiefly on evidence of statements made to parties designedly sent to the defender after the birth, amounting to confession, generally because no denial of the charge. Surely then a *judicial* demand of a claim *timeously* made and *no defence* made must still more amount to a *confession*. When another judicial notice was given to him that he had been *held as confessed* and decree given against him no objection is taken. Notwithstanding these demands, for more than a year the defender submitted in silence to his being decreed to be the father of the pursuer's child, and he cannot be now absolved. H. B."

On appeal the Sheriff (Macdonald) affirmed on 2nd June 1880, with the following note:—

"*Note.*—A defender in such a case is not entitled to the full benefit of any doubt which would otherwise be created by the meagreness of a pursuer's case, when, by putting in no defence at the proper time, and allowing an expired charge to hang over his head for two years, he may have made it impossible for the pursuer to find evidence which might have been available had defences been duly lodged. No reasonable or even plausible excuse has been made for the failure to lodge defences. The Sheriff-Substitute, after seeing the defender and his witnesses, has felt himself justified in disregarding their testimony as being untrustworthy to rebut that of the pursuer. The Sheriff sees no ground to differ from this view. On the contrary, some parts of that testimony the Sheriff cannot believe, as, *e.g.* where the defender's brother states that he never saw the defender speak to the pursuer at all, and where both the father and brother declare that he appeared to shun her. The Sheriff-Substitute being satisfied that the evidence of the pursuer should be believed, has held that that evidence along with the defender's conduct when summoned and charged was sufficient to warrant decree in her favour, and that the legal presumption thereby raised has not been satisfactorily overcome by the evidence led for the defender. In this view the Sheriff concurs. J. H. A. M."

*Act.*—M'Cash.—*Alt.*—W. C. Young.

## SHERIFF COURT OF CAITHNESS.

Sheriffs THOMS and RUSSEL.

JESSIE HENNEY v. HENRY FORBES.

*Aliment of illegitimate child—Whether to be determined by residence of father or mother—Held that residence of mother in ordinary case determines rate.*—This action was raised by a mother resident in Lanarkshire against an alleged father who was resident in Caithness. The defender admitted the paternity, but denied liability for the amount of inlying expenses and aliment sued for. The Sheriff-Substitute (Russel) pronounced this interlocutor :—

“*Wick, 4th May 1880.*—The Sheriff-Substitute having considered the closed record with No. 11 of process (being a minute of admissions regarding the usual rates of inlying expenses and aliment in Lanarkshire), heard parties’ procurators, and advised the case, Finds (1) that the defender having admitted the paternity of the illegitimate male child born to him by the pursuer on 22nd November 1878, he is liable for the maintenance or support of the same as from the said 22nd November 1878 until he (the child) attain the age of seven years complete : Finds (2) that the rate of aliment payable by the defender to the pursuer shall be £4 sterling per annum, payable in equal quarterly instalments, and in advance, as from the said 22nd November 1878 until the date that his said child shall attain the age of seven years complete, and decerns : Finds (3) the defender liable to the pursuer in the sum of £1, 10s. sterling as in name of doctor’s fee and inlying charges at the date of the birth of the said child, and decerns : Further finds that the defender shall be liable to the pursuer in the sum, and at the rate of five per centum per annum as interest on each quarterly instalment when the same shall become due and is unpaid, and decerns : Lastly, finds in respect no alimentary sum was tendered or offered by the defender to the pursuer prior to this action having been raised, that he is liable to the pursuer in the expenses of process : Allows an account thereof to be lodged, and when lodged remits the same to the Auditor of Court to tax and report, and decerns.

HAMILTON RUSSEL.

“*Note.*—The contention of the pursuer was that as her child had been born in Lanarkshire she was entitled to receive aliment for it at the rate allowed by the Sheriff Court of that shire ; but to such a contention the Sheriff-Substitute of Caithness-shire could give no effect. The circumstances of the parties must, before fixing the rate of aliment, be taken into consideration by the Sheriff-Substitute. The invariable rule in Caithness-shire has been to allow, as in the condition of the parties to this action (although there is no definite description as to the pursuer’s calling or occupation in life), £4 sterling annually, with a further sum of £1, 10s. sterling as nursing fee and inlying charges. This rule has been found to work efficiently, and the Sheriff-Substitute does not see that in the present or any other case where the circumstances are similar, that he should alter the rule, and therefore he has decided as above. H. R.”

The pursuer appealed, and the Sheriff (Thoms) reversed by the following interlocutor :—

“*Wick, May 1880.*—The Sheriff having resumed consideration of the pursuer’s appeal, with reclaiming petition for her and answers for the defender, Recalls the second and third findings in the interlocutor submitted to review, and to that extent sustains the said appeal : Finds that the pursuer and defender both admit (see reclaiming petition and answers) that in Lanarkshire, where the pursuer resides, the half of the inlying expenses and rate of aliment falling to be paid by the father of an illegitimate child are respectively £2 and £8 per annum. That the defender is accordingly liable to the pursuer in the sum of £2 of inlying expenses, and that he is also liable to the pursuer in one-half of the aliment of the male child of which he is the father, at the



rate of £8 per annum from the birth of said child, and so long as the pursuer resides in Lanarkshire until the said child attains the age of seven years complete, reserving both the pursuer's and defender's rights as regards aliment in consequence of emerging circumstances. And grants decree in favour of the pursuer against the defender for said £2 of inlying expenses, and for aliment at the said rate of £8 per annum until the child is seven years old, in terms of the conclusions of the petition under the reservation foresaid. And *quoad ultra* adheres to the interlocutor submitted to review, with additional expenses to the pursuer (excepting the expense of her reclaiming petition) as the same may be taxed, and decerns. GEO. H. THOMS.

*Note.*—The only point raised by the appeal is whether the rate of aliment usually awarded against fathers as their share is to be determined by the rate usually given in Caithness or that usually given where the mother resides or has resided. As usual, no assistance as regards the legal principles on which the point should be determined is given in the reclaiming petition and answers, and hence the expense of the reclaiming petition has been disallowed. An action of filiation is an action of debt between the parents, and is brought to effect her relief by the mother of part of that support which she is bound to give her child (per Lord Neaves in *Bruce v. Stiven*, Dec. 5, 1863, 2 Macph. 223). This being so, the question turns on the support given by the mother, and the admission of parties here puts that in Lanarkshire and at Lanarkshire rates. So far as the Sheriff can find, the only case in which the point arose for consideration was an A. B. case in the Sheriff Court of Renfrew in February 1875, reported by Mr. Guthrie in his valuable collection of Sheriff Court Decisions, p. 44. The Sheriff of Renfrew there remarked: "Reference must be had, in deciding this question [the rate of aliment], to the circumstances of the locality in which the pursuer is resident. A shilling in Unst is of far more value than the same coin in Paisley, and therefore a rule that may be a good one for one county would be inequitable as applied to another. In performance of their duty of deciding upon the complaints of inadequate relief by paupers, the Board of Supervision have always taken into consideration the mode and means of livelihood of the people of the district from which the complaint comes, and the Sheriff thinks that this would be a legitimate consideration in disposing of the question as to the amount of aliment in a filiation cause." The Sheriff agrees in the principles thus stated, and gave effect to them in a poor law case from Zetland, in which the usual rate of relief accorded to a pauper by the inspector of Lerwick, where the pauper was resident, was called in question by the inspector of Unst, who wished his low rate of relief applied to the claim for repayment. These principles the Sheriff has by his present findings extended to the case of an illegitimate child. G. H. T."

## SHERIFF COURT OF ELGIN.

Sheriff-Substitute SMITH.

INNES v. W. and G. SMITH.

This case raised the point whether a declaration emitted by a prisoner can be afterwards used in a civil action brought against him. Some time ago Adam Innes, hostler, Elgin, raised an action to recover damages from William Smith and George Smith for an assault committed upon him on the 31st December last, and for which the defenders were tried and convicted before the Sheriff at Elgin. Pursuer put into the process certified copies of the declarations emitted by the defenders after they were apprehended on the criminal charge. The defenders, in a preliminary plea, objected to their declarations being received, and pled that it was not competent to produce in any shape statements elicited from the defenders in a criminal prosecution under circumstances where professional skill was employed for the prosecution

and no professional assistance allowed the defenders to protect them or explain the circumstances.

Mr. Sheriff Smith has issued the following interlocutor and note, repelling the plea :—

*“Elgin, 9th June 1880.—*The Sheriff-Substitute having considered the cause, repels the whole pleas in law of the defenders against the relevancy of the action, and also the special plea in law of the defenders against the admissibility of the judicial declarations mentioned in the record, and appoints the case to be enrolled for farther procedure.  
D. MACLEOD SMITH.

*“Note.—*The present is an action of damages in respect of several acts of assault alleged to have been committed by the defenders upon the pursuer. These assaults are said to have been also the subject of criminal charges against the defenders, under which they were judicially examined, and afterwards tried and convicted. The judicial declarations are said to have been publicly produced and founded on at the criminal trial, and what bears to be certified copies of them are now produced in order to raise the question whether or not the original declarations can be used in evidence in so far as consistent with the averments of the pursuer, and, if necessary, to test the evidence which may be given by the defenders, or adduced on their behalf in the course of the present process.

*“*The defenders have stated several pleas in law against the general relevancy of the action as originally laid. In consequence of amendments made by the pursuer at adjustment, the defenders do not now insist on these general pleas. These pleas have therefore been repelled, but the defenders still insist in their plea in law against the competency of using or referring in any way to their declarations in the criminal proceedings. They, however, expressly disclaim any suggestion of any special unfairness in regard to their own examinations, and state the plea entirely on the ground of abstract principle.

*“*Judicial declarations are statements made in relation to a criminal charge, or charges, at the examination of the person or persons accused, after they are taken into custody. Before being examined they are informed of the charges against them, and are warned that they need not answer the questions put to them unless they please, but that, if they do answer them, their answers will be taken down in writing, and may be used in evidence against them. Every possible precaution, except the admission of the public, and the resort to legal advice by the accused at the time of the examination, is taken that no compulsion or undue influence can be resorted to. The exclusion of the public is necessary in accordance with the principle of the law of Scotland, which properly desires, both in its civil and criminal departments, to prevent, as far as possible, persons who are afterwards to be adduced as witnesses at the trial from knowing, previously to their own examination at the trial, the statements of any other person or parties in regard to the same matter. But this exclusion is only partial and temporary. There are never less than five or six officials, who are mostly independent of each other, and none of whom have any personal interest in the result, present at every judicial examination, and the whole of these are liable to be publicly examined at the trial, if there should be the least cause for doing so, or the least doubt as to the fairness of the procedure.

*“*Legal advice is not allowed to an accused person at his examination, because he is not on trial at that stage. The proceedings in regard to him at that time consist of a simple uncompulsory preliminary inquiry into facts, without any question of law or legal pleading, and in regard to which there is no more room or occasion for legal advice than there is with a party or a witness in the witness-box. There is not even so much, as the accused need not answer any question whatever unless he pleases. Another reason for disallowing legal advice at the preliminary examination is that it would prevent the privacy which is considered necessary in the interest of the accused himself, as well as of the public prosecutor, to the purity of the other evidence.

In the event of a conspiracy or false charge, of which, under the Scottish system of criminal procedure, it may be said that there has not been one successful example within recollection, or within modern record, nothing can be imagined that would give greater or more dangerous facilities to the accusers, than to know from the first the statements of the accused when examined before the magistrate.

"The declaration of an accused person in the position which has been explained, if he do not admit guilt, and if he do not more or less decline to answer the questions put to him, consists generally of a statement of the whole truth, if he be innocent, or of such facts as he may believe or suppose will tend to his exculpation. If his statements are true, and if they tend to his advantage, he is properly entitled to found on them to that effect. If, on the other hand, they are not true, it can hardly be maintained that the law should go out of its way to lay down artificial principles in order to afford him absolute protection against all or any of the consequences of his own voluntary falsehoods.

"At common law, any statement made by a party, however incautiously, whether verbal or written, has always been held to be admissible and competent evidence against himself. Of course the weight of the statement may be open to explanation and qualification according to the circumstances in which it was made, but it has never been doubted that the statements of an accused person, made freely and deliberately in the manner in which such statements are in use to be made at judicial examinations, may be founded on as evidence at criminal trials, and that, subject to such qualification, they may be the ground of the most serious results known to the criminal law. The nature and effect of judicial declarations in this respect are fully explained in Hume's Commentaries, vol. ii. p. 324. It seems to be a singular proposition to maintain that such statements made by a party himself, and which may be evidence against him in a criminal court involving his life or liberty, should not even be admissible to be looked at in a civil court in regard to the trial of the same facts for the mere pecuniary or other purposes of the civil law.

"It might be contended that as long as judicial declarations are in the hands of the criminal authorities for their consideration, they should not be available for any other purpose except with their permission. But where, as in the present case, the judicial declarations have already been used at a public trial, and the criminal proceedings terminated, there seems to be no reason why the declarations should not be available for the ends of justice in the civil court as well as in the criminal courts. It has accordingly been the practice so to use them. A series of cases to this effect are mentioned in the note to the late Lord Ivory's edition of Erskine's Institutes, B. iv. 7, 33, and by Mr. Dickson in his work on the Law of Evidence, sec. 1435.

"The point could hardly have been now raised again except for the finding in regard to judicial declarations in the case of *Little v. Smith* (9th December 1845, 8 D. p. 265, and 9 D. p. 737 and 762), but that finding was in a case in which there had never been any criminal trial, and in which the declaration had never been made public. It was a finding, also, which even so modest a commentator as Mr. Dickson has found it necessary to question. (See Dickson on Evidence, sec. 1436 and note.) The result of the case *Little v. Smith*, in consequence of that and other findings, seems to have been unsatisfactory to some of the judges themselves, and the dissatisfaction, it is thought, must be shared in by most persons who may examine and consider the case in view of the facts mentioned in the note of the Lord Ordinary, from whom it was appealed. The Master of the Rolls (Sir G. Jessel), in the recent case of *Knatchbull v. Hallett*, says that the only use of authorities or decided cases is the establishment of some principle of law which can be followed by other judges. (See L. R. Ch. D. vol. xiii. p. 712.) It would not be easy to formulate any maxim or rule expressing any sound principle of law from the decision in the case of *Little v. Smith*. Unless this could be done it can hardly be accepted as an authority sufficient to overturn previous decisions to the

contrary effect, even if it were applicable to cases in which the judicial declarations had already been used in public. It stands *per se*. It does not profess to proceed on any previously-recognised general ground of exclusion, and it does not enunciate any new one.

"Since the case of *Little v. Smith* was finally disposed of in 1847 the tendency, both of the Courts of Law and of the Legislature, has been more and more in favour of the admissibility and against the exclusion of evidence on sentimental or artificial grounds, leaving the weight or value of the evidence to be dealt with on the footing which has been referred to. The operation of this tendency has gone so far that little or no reliance can be placed on previous decisions proceeding on principles which have now been superseded. No stronger example can be given of this than the fact that the evidence of parties in a certain class of cases, even in the shape of reference to oath, which in 1867, in the famous *Yelverton* case, was refused to be received, both by the Court of Session and the House of Lords, on the ground of being inexpedient and inadmissible, was subsequently declared by the Legislature to be both expedient and admissible by the Evidence Act of 1874. In the light of such progress, pleadings and findings in not very remote cases, on such points as the inadmissibility of evidence on such grounds as personal interest, relationship, partial counsel, *penuria testium*, *metus perjuriae*, and the like, now excite surprise at the ingenious sophistry and obliquity of perception, leading, in many respects, rather to concealment than disclosure of the truth, which then passed for sound legal principle, and makes one doubt whether or not there may not be other legal doctrines still received which may not be as well founded as they ought to be.

"If the plea of the defenders were sustained, it would lead to the anomalous result that the Court could not use for the trial of the present case documents in its own official custody containing direct statements by the defenders relating to the facts of the case, and the contents of which are already unavoidably known to the public, including the members of the Court and the parties and witnesses in the cause. It would involve the further anomaly that, in the event of the defenders exposing themselves to a prosecution for perjury, the Crown could not use these official documents already in their hands. It is unnecessary to follow out the other practical contradictions which would arise, further than to point out that, if the pursuer should not be allowed to use the declarations, it would enable the defenders without such check to adjust their evidence to the circumstances as they now know them. They may or may not be persons capable of doing so, but the exclusion of the declarations might afford them a temptation to that effect, and deprive the pursuer of rights which he is entitled to in regard to all other kinds of evidence. All available checks of the kind are especially requisite in the present case, because, the principal evidence having already and unavoidably become public at the criminal trial, the facilities of improper combination are greater than they would otherwise have been.

"Even if the defenders had alleged that any coercion or undue influence had been used against them at their examination, the rational course would be, not to exclude the declarations, but to allow proof of the alleged coercion or other undue influence, in so far as it might affect their credibility.

"I have therefore no hesitation in allowing the declarations, when the originals are produced, to stand for what they are worth, as part of the process, and, if necessary, to be made the subject of reference in the examination of the defenders.

"It might have been sufficient without raising any question at this stage for the pursuer to have recovered and proved the original declarations in the course of the proof, but, understanding that objection was to be made to their reception, it is fairer to the defenders, and more satisfactory to the Court, to have any points of law in regard to them discussed and disposed of beforehand in the manner which has been done.

D. M. S."

Act.—Cruickshank and Burnett.—Alt.—Forsyth and Stewart.

## Notes of English, American, and Colonial Cases.

**PARTNERSHIP.**—*Business carried on by surviving partner—Division of profits.*—A. and B. entered into partnership in the business of oil and lamp sellers, for a term of ten years, under articles which provided that after payment of interest on their respective capitals, the net profits should be divided equally between them. The ten years' term having expired, A. and B. continued to carry on the business until A.'s death, as a partnership at will, on the footing of the partnership articles. After A.'s death, B., without the consent of A.'s representatives, and claiming (but, as the Court held, erroneously) to be entitled so to do under a clause in the articles, continued to carry on the business alone for a period of three years, retaining and employing the capital of A. therein. At the time of the constitution of the partnership, and at all times subsequently, the capital of A. largely exceeded that of B. In a partnership suit by the representatives of A. against B.—*Held*, that after making a proper allowance to B. for his services in managing and carrying on the business during the three years, the profits earned during that period were divisible rateably between the representatives of A. and B., according to the proportions in which the partners were entitled to the capital employed in the business.—*Yates v. Finn*, 49 L. J. Rep. Chanc. 188.

**PRESCRIPTION.**—*Light*—"Consent or agreement expressly made or given by deed or writing"—*Agreement signed by licensee only—Evidence—Declarations.*—Agreement in writing dated 1814, whereby K., the owner in fee of a house at W., who had put out four windows overlooking the adjoining house of S., declared that "these windows were put out and remained upon the leave or indulgence of S., and that he (K.) would at the request of S., his heirs or assigns, wall and block up the same, and in the meantime, until such request was made, he thereby promised to pay to S., his heirs and assigns, the sum of sixpence yearly, to commence from the day of the date of the said agreement, in consideration of such indulgence." This document was signed by K. only. The rent of sixpence had been admittedly paid up to the year 1854, and the Court, upon the evidence adduced, was satisfied that the rent had been paid up to 1859, being within twenty years from the commencement of the action. K. had devised the house to his widow in fee, who devised it to trustees upon trust for sale, and they on her death sold it, when the plaintiff's father purchased it with full notice of the agreement. He dying intestate, the house became the property of the plaintiff as his heir-at-law. The defendants, who now represented S., obstructed the four windows mentioned in the agreement, and the plaintiff brought an action claiming a mandatory injunction to restrain the defendants from obstructing the access of air and light to the windows, and to remove an existing obstruction, and claiming damages :—*Held* (affirming the decision of Hall, V.C.), that the agreement, although signed by the licensee only, was a sufficient consent and agreement in writing within the terms of the 3rd section of the Prescription Act; that it was not limited to the life of the licensee, but was binding on his successors in title.—*Bewley v. Atkinson*, (App.) 49 L. J. Rep. Chanc. 153.

That an agreement for valuable consideration with reference to the windows of a house is as much enforceable in equity as any other agreement with respect to real property.—*Ibid*.

Per Thesiger, L.J.—The principle upon which written entries of a deceased person are admissible in evidence is this, that in the interest of justice where a person who might have proved important material facts in an action is dead, his statements before death relating to that fact are admissible, provided that there is a sufficient guarantee that the statements made by him are true; and it is properly considered that when the statements made by a person were against his interest, those statements in the general run of cases are true. Nor is there any distinction between the written entries of such a deceased person, under such circumstances, and his verbal declarations, although the evidence adduced to prove mere verbal declarations must of course be more carefully watched.—*Ibid*.



# THE JOURNAL OF JURISPRUDENCE.

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## EDUCATION FOR THE SERVICE OF THE STATE

### IV. BELGIUM.

It has been our good fortune in these papers to report the information and opinions of such eminent and well-known publicists and lawyers as Bluntschli and Martens, who are in their respective countries the trusted advisers of the Government.

With regard to Belgium we have the additional advantage of being able to lay before our readers the views of M. Rolin Jaecqmyns, whose contributions to the elucidation of the Eastern Question have given him a high place amongst international lawyers, and who in his own country now holds the responsible and important office of Minister of Home Affairs. The University of Edinburgh has the honour of having enrolled amongst its graduates in the Faculty of Law M. Jaecqmyns before he obtained official distinction, and we trust this is a good omen for the future development of the studies of that Faculty to the position which we shall see presently they occupy in Belgium, as in the other countries of the Continent, as an appropriate and recognised road to the service of the State. It is a laudable custom of our Academies of Art to receive from their members a diploma painting as a recognition of their admission. Might not this custom be profitably extended to the honorary graduates of the Universities? M. Jaecqmyns has at all events shown himself disposed to act in its spirit, and has spared no pains in the midst of the many urgent calls which a Minister of State has upon his time to give his Scottish friends, who retain a grateful recollection of his visit to Edinburgh, the benefit of his experience and knowledge. In answer to the questions submitted to him with reference to the position of University Education in Belgium in its relation to the service of the State, M. Jaecqmyns reports in substance as follows:—

“No Belgian law requires attendance at a university during any

period as a condition of admission to any profession or to any branch of the public administration. The dominant opinion in Belgium is that to require this would be incompatible with the principle of liberty of instruction which is laid down in the Belgian Constitution.

“The possession of an academical degree is, however, in a different position. This is considered indispensable not only for the exercise of the professions called liberal, of medicine and law, but also for admission to a certain number of public functions. To require the possession of a degree is not regarded as a violation of the Constitution, for it is deemed one thing to exact attendance at special schools, and consequently to prevent the liberty of gaining instruction either at home or abroad, and another and different thing to establish by a title considered probative that a person has procured, it does not matter in what measure, the scientific knowledge believed to be indispensable for the performance of a particular public office. In the present condition of the Belgian law no one can exercise the learned professions without holding a scientific diploma. Thus to practise as an advocate he must be a Doctor of Law (*Docteur en Droit*); to practise as a physician, surgeon, or accoucheur, he must be a Doctor in Medicine, in Surgery, and in Midwifery respectively. As a general rule, to discharge judicial or legal functions it is necessary to have a scientific diploma from University Examiners. This rule applies to all proper judicial offices, as those of Justices of Peace (*Juges de Paix*), Judges of a Court of First Instance, Counsellors in the Courts of Appeal, or in the Supreme Court of Cassation, as well as to the officials in the department of the Minister Public, from the lowest grade of deputy or substitute of the King's Advocate at a tribunal of the First Instance, to the highest grade, that of King's Advocate at the Court of Cassation. The functions of the Minister of Justice alone being of a nature principally political, do not require, according to our law, any conditions of aptitude. That is indeed the case in all political offices, although in fact there has never been to my knowledge any instance of a Minister of Justice who has not been a Doctor of Law.

“Before the tribunals of Simple Police (*i.e. Juges de Paix*) the duties of the public prosecutor are discharged by Commissaries of Police who do not require any academical degrees.

“There are in the judicial or legal department a whole category of officials who, without being, strictly speaking, State functionaries, discharge public duties. Such are notaries, advocates at the Court of Cassation, and agents who are charged with giving authenticity to certain judicial or extrajudicial acts, as contracts, testaments, and acts of procedure. Of these the notaries require to pass an examination attesting their knowledge of certain matters which are taught in the Universities. This examination relates to the law of notaries, fiscal law, criminal law, and the elements of civil law.

The advocates at the Court of Cassation, as well as ordinary advocates, must graduate as Doctors of Law.

"No academical degree is required for the exercise of legislative functions. In the department of Civil Administration properly so called it is necessary to distinguish between the educational and the other administrative services. State education with us comprehends the three grades of primary, middle or secondary, and superior. It is only for the teachers in the two latter that University degrees are in general requisite.

"In the middle or secondary education the degrees required vary according to the subjects to be taught. The degree of *Candidat en Lettres* (Bachelor of Arts) is required for the teachers of languages, literature, history, and geography, and the degree of *Candidat en Sciences* (Bachelor of Science) for the teachers of science.

"As regards superior education it is in general necessary that a professor in the Universities should be a Doctor of the Faculty in which he teaches, but there are in practice exceptions from this rule. For the other administrative services of the State, with the exception of education, no academical degree is in general required. Each department recruits itself according to its own special rules, which often imply an examination, but this is an examination entirely independent of the University examinations. Only it is of course the case that when the conditions are equal, University degrees give a title of preference to those who possess them where their possession implies the knowledge necessary for the particular office desired.

"There is, however, with regard to the department for the Administration of Roads and Bridges, and that of Mines, a special provision, which may be called mixed, in this sense, that there is a School of Engineering attached to the University of Ghent, and a School of Mines attached to the University of Liège. The courses in these schools are, in fact, the same as those in the Faculty of Sciences. There is also a School of Mines at Mons, where professors are appointed by the State.

"It must also be remarked that, probably in consequence of the constitutional principle of liberty of instruction, attendance at these special schools is no more necessary than attendance at the Universities, and that the diploma of engineering may be obtained by passing an examination only.

"There have in consequence been created at Brussels and Louvain Free Schools of Engineering in connection with the Free (*i.e.* not State) Universities of these towns. To enter the diplomatic or consular service no academical degree is necessary. A special administration is, however, required for candidates who enter the Corps Diplomatique in the ordinary way, but this has no connection with the Universities.

"I should explain that our degrees in each Faculty are of two sorts, Candidate and Doctor, and to be admitted to the latter the

former must be first taken. Before our latest law on superior instruction, passed in May 1876, it was necessary to graduate in arts or science before proceeding to graduate in law or medicine, but this has now been altered. There is no limit of age after which graduation is not competent in any of our Universities."

In a letter which M. Jaecqmyns sent along with the answers to the questions put to him as to the education for the service of the State in Belgium, he adds this general reflection: "It is necessary not to conceal from ourselves that the present time is not an epoch of purely scientific development. The economic conditions of our existence, the instability of several sources of income, and of the value of money in relation to the value of other things, produce in the great majority of students as their dominant thought the increase of their immediate value in the economical or political market. I believe that we can do nothing to prevent this fact which exists in the world of the arts as well as of the sciences. We ought, on the contrary, to recognise it and to lay our account with it in the reorganization of the higher education. How can we best do this? By exacting substantial proofs of scientific capacity from those who intend to practise as advocates or doctors, or who aspire to enter into the service of the State. By this means we shall give to science an economic value which it has not at present. I am not then a partisan of half measures on this subject. I believe that it is necessary resolutely to introduce a compulsory system of higher education for those who aspire to important offices in the State, as we have already introduced a compulsory primary education for the people." How different these views of the Belgian statesman are from those until recently, and even now generally, adopted by the politicians of this country, it is not necessary to point out. We do not at present attempt to pronounce between them. It has been the object of this, as of the previous papers in the same series, to report facts drawn from widely different sources, for which we have the authority of highly competent witnesses, and opinions which, as regards the circumstances of their own countries, these foreign observers are well qualified to form. By the Belgian law of 20th May 1876, with reference to University degrees, to which M. Jaecqmyns alludes in the foregoing observations, graduation in all the Faculties is regulated. We translate the provisions applicable to degrees in law, of which there are three in Belgium.

I. The subjects of examination for *Candidat en Droit* are—The History of Roman Law. The Institutes of Roman Law. Natural Law and the Philosophy of Law. The Encyclopædia of Law and the History of Civil Law.

II. Those for *Docteur en Droit* are—The Pandects of Roman Law. The Code Civil. Public Law and Administrative Law. The Criminal Law of Belgium. The Elements of Commercial Law. The Elements of Civil Procedure. Political Economy.

III. Those for *Candidat Notaire*, where the aspirants are not

already Doctors of Law, are—The Encyclopædia of Law and the History of Civil Law. The Code Civil. The Law with reference to the Office of Notary. The Fiscal Law.

As regards the arrangement of these subjects it does not appear to us that the Universities of Scotland have much to learn from those of Belgium. The degree of B.L., which is now gaining a definite position and value from the increase in the number and the ability of many of the candidates who present themselves for it, appears to be better adapted for the requirements of professional life than the Belgian degree of *Candidat en Droit*, as it embraces the branches of law, a knowledge of which is necessary to all practitioners, while the degree of LL.B. is at least as complete in the circle of legal studies which it embraces as the Belgian Doctorat. Whether a hint might not be taken from the Belgian system as to the examination of notaries, and whether also the latest change in that system might be safely followed by dispensing with the conditions of an arts degree as a preliminary to the degree of LL.B., are subjects which deserve consideration. Æ. M.

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## CONDITIONS IN "LEFT-LUGGAGE" TICKETS.

### HANDON v. THE CALEDONIAN RAILWAY COMPANY.

A CASE of the description known in England as "cloak-room," but which might more correctly be called "left-luggage," cases was decided on 18th June last by the First Division of the Court of Session. The case is of interest to the travelling public, and it is of importance to lawyers, because the principles of decision on which the judges here acted are antagonistic to those which have been acted upon in England, notably in the leading case on the subject, *Harris v. Great Western Railway Company*.

The pursuer on arriving at the Buchanan Street Station of the Caledonian Railway in Glasgow, left at the "left-luggage" office two trunks, for which he paid the usual twopence, and got the usual ticket. One of the trunks was put in the office and the other was left on the platform. On the pursuer's calling for the articles next day, it was found that the trunk which was left on the platform had disappeared. The pursuer brought an action for the value. The company maintained that they were not liable, being protected by a condition on the ticket, which they contended formed the contract between the company and the depositor. On the face of the ticket there was printed very distinctly, "The company only receive the within-mentioned articles upon the conditions expressed on the back of the ticket." On the back it is said that the company "only warehouse articles of luggage and other articles subject to the following conditions." The first condition was, that for each article a charge of twopence would be made "when



deposited;" the second was, that the articles would be given up on production of the ticket, "after which all responsibility on the part of the company will cease;" and the third was, that the company would not be responsible for the loss of or injury to articles "*deposited in their cloak-room or warehouse*" when the value exceeded £5, "that is to say, when any parcel," etc., "deposited in the company's cloak-room or warehouse exceeding the value of £5 is lost," etc., the company would not be liable in any sum whatever, unless the value was declared to exceed £5, on a form to be signed by the party depositing, and a charge paid "in addition to the ordinary deposit charges." It was on this third condition, and on this alone, that the company relied. The value of the article lost exceeded £5, and the value had not been declared. The answer of the passenger was that the condition only applied to a case where the article was warehoused by the company; and that in this case the article had not been warehoused. The Court held this a good answer. The company had said that they would not warehouse articles except on certain conditions. This, as the Lord President observed, was an undertaking that they *would* warehouse articles upon these conditions. For what, it may be asked, did they take the twopence, if not for warehousing the article mentioned in the ticket? The condition on which the company relied was one exempting them from liability in a certain case for articles "deposited in the company's cloak-room or warehouse." If the article was not "deposited in the company's cloak-room or warehouse," the condition surely did not apply. A condition exempting from responsibility in the course of carrying out an undertaking is inoperative if the undertaking is not carried out or even attempted to be carried out. The condition was incident to the obligation of warehousing, and could only come into operation when the obligation came into operation. If the article had been warehoused without the value being declared, of course the passenger (assuming that he was bound by the condition in the ticket) would have had no claim in the event of the article being lost. He chose to run that risk; but he did not undertake the much greater risk of the article being lost when it did not receive the security afforded by being put in the company's cloak-room or warehouse. It was contended on the part of the company that the goods were "warehoused," or at any rate they were as safe as if they had been put in the cloak-room or warehouse, when they were put on a part of the platform adjacent to the cloak-room, where they were under the eye of the officials inside during the day, and which it was alleged was safe enough at night, because the station was locked up, and the platform was perambulated by a policeman. There are more answers than one to this contention. (1) The platform, even a part of the platform adjacent to the cloak-room, as a matter of fact is not as safe as the cloak-room. There is no more unsafe place than a railway platform. And as the nearer to church the farther from grace,

so the nearer the cloak-room the farther from safety. People are so constantly removing luggage from a railway platform, especially from a place in the neighbourhood of the left-luggage office, that nobody pays the slightest attention to the removal of any article. So much is this the case, that in the case of the loss of luggage which gave rise to the action *Harris v. Great Western Railway Company*, the thief asked and obtained the assistance of a policeman in removing the articles left in the vestibule of the cloak-room. (2) Whether it was safe or not, a platform, if there is any meaning in ordinary language, is not a warehouse. And (3) the company having a room specially set apart as a cloak-room or warehouse for left luggage, where left luggage was usually deposited, and from which the left-luggage ticket was issued, the passenger was well entitled to rely upon his luggage being deposited there.

In the case of *Harris v. Great Western Railway Company* (L. R. 1 Q. B. Div. 515) a different result was arrived at by the English judges in circumstances substantially the same. No comment was made upon *Harris's* case by the judges of the First Division, and no dissent was intimated from the view there expressed, we presume because there was no call upon the Court either to regard it or disregard it. The judgment is antagonistic to that pronounced in *Harris's* case. We say so not merely because the result was different though the circumstances were substantially the same, but because the principles on which the majority of the Queen's Bench Division went entirely cover the case of *Handon*. There was this difference between the facts of the two cases. In *Harris's* case the luggage was placed not on the platform, but in the "vestibule" of the cloak-room—rather an elegant name for the entrance to such a place. It was not put in the cloak-room however, as it ought to have been, if we read the conditions rightly. These conditions were substantially the same as in *Handon's* case. The ticket was headed "luggage and cloak office." On the face of it were printed the words "subject to conditions on the other side." On the other side was a statement of the sums to be paid "for warehousing passenger's luggage." It was declared that the company would not be responsible for the loss of or injury to "any such package" (evidently a package to be warehoused, and for warehousing which the sum charged was given) unless the value was declared and a sum paid "in addition to the before-mentioned ordinary warehouse charges." Then followed a statement that the company would not be responsible under any circumstances for loss of articles "except left in the cloak-room." In conclusion it was stated at what times the cloak-room would be open on Sundays. We cannot help asking with Mr. Justice Lush, who dissented from the opinions of Mr. Justice Mellor and Mr. Justice Blackburn, "What is this but a plain intimation that the goods are to be deposited in the cloak-room?" If all this does not amount to a distinct obligation to warehouse the goods, and to

warehouse them in the cloak-room specially devoted to that purpose, then there was no such obligation in *Handon's* case either, for the conditions are substantially the same.

The view taken by Lush, J., was that taken by the judges of the First Division. "The inference to my mind is irresistible, that the company by the very terms of the ticket engage to keep the goods in the cloak-room; and that being so, the condition in question must be read as applying to a cloak-room custody, and as if the words had been that the company will not be responsible if they are stolen from the cloak-room, etc. . . . As the goods never were in the cloak-room they were not subject to these conditions."

Mr. Justice Blackburn took a different view. "I do not think that depositing the luggage in the vestibule would have been any breach of contract, if the defendants had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger." "I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care." The answer to which is, that the precautions and the protection for which the passenger leaving his luggage bargained, were the precautions and protection afforded by placing them in the particular place of custody mentioned in the ticket, and the obligation of the company was not discharged by taking some other precaution for the safety of the articles which in the company's opinion was equally good, but which, as a matter of fact, and as it turned out, was not equally good.

The principles laid down in *Harris's* case would cover a departure from the ordinary precaution of depositing the luggage much greater than that of placing it in the vestibule of the cloak-room. The view taken by Mr. Justice Mellor would free the company from liability in a case where the value of goods above £5 value were not declared. That learned judge observed (p. 525): "I cannot but think that the true effect of that condition with the others really is to notify that unless the articles have gone through the process of being ascertained, counted, and the fees duly paid at the luggage and cloak office, the company will not be responsible at all." If it had been said, "will not be responsible at all *for luggage deposited in the cloak-room*," the opinion would have been a correct one. But if Mr. Justice Mellor's interpretation of the condition was right, and the company is not to be responsible unless the articles have gone through the process described in the condition, including the declaration of the value, the company should not have been liable in *Handon's* case, no such declaration having been made.

The Court did not find it necessary in *Handon's* case to decide whether the depositor of the luggage was bound by the terms of the ticket he received. This is a much more important question than the one actually decided. There are a number of cases regarding the binding effect of conditions in passengers' travelling

tickets. The responsibility of railway companies as carriers no doubt is a different thing from their responsibility as warehousemen. It has a different origin and it has a different extent. But the two classes of cases have an affinity so far as concerns the question, How are railway companies to get quit, totally or partially, of the liability which they do incur as warehousemen or as carriers, and which is an incident to their acting in these capacities? We do not get much help from cases of this kind as to carriers, because the decisions are not uniform, and, what is indeed fatal to the prospect of uniformity of decision, there are strong traces even yet of two opposing lines of opinion on the subject, one doctrine being that a notice of a limitation operates as a special acceptance, that is, as a limitation of the public profession of a carrier; the other, that it can only operate when it amounts to a special contract. The position of railway companies as carriers and as warehousemen differs in this, that they are not bound to act as warehousemen of passenger's luggage, while they are bound to act as carriers. In *Harris's* case Mr. Justice Blackburn observed, the defendants "as a railway company are not bound to receive goods at all for custody." This is quite true, but it is quite irrelevant. It is equally true that when they do receive goods for custody and are paid for being custodiers, they are bound to certain duties and incur certain liabilities. They are bound as depositaries for reward to exercise due care and diligence in keeping the goods intrusted to their charge, and they are liable for loss or damage caused by the want of such care and diligence. How are they to limit such liability? It seems to us that they must limit their liability in the same way as they incurred it. They have contracted themselves into it and they must contract themselves out of it. To contract themselves out of it there must be assent to the conditions of limitation of liability on the part of the person dealing with them. Assent may be proved in various ways, and may be inferred from various circumstances; but, as we take it, assent is an indispensable element. According to the decision in *Parker v. South-Eastern Railway Company* (2 C. P. Div. 416), the proper direction to a jury in such cases is whether the company did that which was reasonably sufficient to give the passenger notice of the conditions. If by this is meant that an answer in the affirmative is sufficient to determine the case in favour of the company, we doubt very much if the doctrine is a sound one. There is great pertinence in the query which Mr. Pollock ("Principles of the Law of Contract," p. 31) appends to the statement that it is sufficient if the passenger has "reasonable means of knowing" the special conditions on which the company intended to contract. Reasonable means of knowing is important as a circumstance from which actual knowledge may be inferred, and the value of actual knowledge is as an element of assent or in barring from afterwards dissenting, but in itself reasonable means of knowing is nothing. Reasonable means of knowing is no basis

for a contract. When a railway company undertakes the duty of warehousemen, a person dealing with them is entitled to assume that they do so with the ordinary liabilities of warehousemen; and it is for them to show that the contract was made on a different footing.

"It is clear," says Mr. Justice Blackburn in *Harris's* case, "that the defendants meant that the ticket should be the contract; what more could be required to justify their servants as reasonable men, in believing that the person bringing the goods and paying the money, as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket, and to induce them to receive the goods on those terms? I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants as to preclude them from asserting as against her, that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe conduct." This is surely a very strange doctrine. In a question between the railway company and their own servants, the intention of the company that the ticket should be the contract may be of great importance; but in a question between the depositor and the depositary it is of very little. There are two parties to a bargain, and the intention of only one of them goes for nothing. The matter to be considered is not whether the company apprised their servants of the fact that they intended the ticket to be the contract, but whether they apprised the passenger. The passenger has no concern with the relations of the company and their servants *inter se*. The company have an office where the business of warehousemen is carried on; they have servants to carry on that business; and by allowing their servants to carry it on for them, they do give the passenger reason to believe that they had authority to do so in the ordinary way, and subject to the ordinary responsibilities incident to that line of business. If the intention of the company that the ticket should be the contract were by itself all-important, there is no need of considering what is the position on the ticket of the condition limiting liability—whether it is on the front or the back.

As regards the question whether the passenger has reasonable means of knowing, or whether the company has done that which is reasonably sufficient to give notice of the condition, we doubt very much whether the mere placing of a condition in small type on the back of a ticket or on the front of it either is enough. People are not always on the outlook for a limitation of a company's liability in point of law. Few people, observes Mr. Justice Blackburn, can come to the left-luggage office and get a ticket "with-



out knowing that the ticket is to be kept and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money." They may know that it is something more than a receipt for the money, they may, and as a rule do, know it is the evidence to be produced, when they apply for the restoration of their luggage, of their right to get it; but it by no means follows that they know it contains conditions limiting the contractual responsibility of the company as warehousemen. As a rule people do not know this. These cloak-room cases have made a great many persons aware of that fact who did not know it before. There are many people, however, travelling by railway who do not read the law reports; and there are many ways in which the railway companies might have obtained a larger circulation for their advertisement of the conditions limiting their liability at a much smaller cost.

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#### NOTES IN THE INNER HOUSE.

THE various cases relating to the liabilities of the unfortunate shareholders in the City of Glasgow Bank liquidation having been decided against trustees where trust estates were involved, there is now beginning to spring up a fresh crop of questions between trustees thus rendered personally liable and the beneficiaries under their respective trusts. Such a matter was at issue in the case of *Robinson v. Murdoch and Others* (Fraser's Trustees) (17 S. L. R. 524), decided on March 10, 1880. Mrs. Fraser by trust deed left the income arising from two sums of £2000 each to her two sisters, the sums in question being at the death of the life-renters payable to their children. The elder sister was Mrs. Sinclair, and the younger Mrs. Robinson, to whom the testatrix left the provision of £2000 "in precisely similar terms." Part of Mrs. Fraser's means which was set aside to meet the obligation in favour of Mrs. Sinclair was retained (to the extent of £200 of the stock) in City of Glasgow Bank shares, with the free consent of the beneficiary herself, she having, in reply to an inquiry whether she would "care to take £1000 worth of the City of Glasgow Bank stock as part of the money to be invested for your behoof by the trustees under Mrs. Fraser's will," replied, that though unwilling to risk so much as £1000, "with the consent of the trustees I would willingly invest £500, and that on my own responsibility." It should be mentioned that the trustees had pointed out that their brokers recommended realization, and that in their own view bank stock was not a suitable kind of investment for trustees to hold. Mrs. Fraser's deed gave a power to her trustees *to continue, without any personal responsibility for loss, to hold any such stocks as she might die*

*possessed of, if they deemed it expedient to do so*, and they also were empowered to lend on such security as they approved the two legacies of £2000 respectively. The trustees were placed on the register when the bank failed, and had now to seek relief against the trust estate. This they proposed to do by paying the calls out of the trust funds belonging to *both* the ladies, and Mrs. Robinson raised a suspension and interdict to prevent their touching her £2000. Each year the trustees had sent to each lady an account of the investments of her £2000 and the amount of the interest, and the bank stock was included only in the account sent to Mrs. Sinclair, and not in that sent Mrs. Robinson. The whole of the investments alike, however, stood in the names of the trustees.

The trustees maintained that under the power given them by the trust deed, and italicized by us above, they were authorized to retain the stock, and were accordingly, so far as the whole trust estate could relieve them, entitled to be protected from loss. The point came to be whether the bank stock was truly retained in the exercise of the power under the trust deed, or merely to accommodate Mrs. Sinclair and for her benefit only. The judgment of the trustees, as shown by the quotation from their letter already given, would have led them to part with all the bank stock, and it was certainly a reasonable contention, and one to which Lord Rutherford Clark, the Lord Ordinary, gave effect, that truly they took this matter on themselves to benefit, or at least with the wish to benefit, not the whole trust estate, but Mrs. Sinclair only. Were they then entitled to claim relief, however much freed by the terms of the original deed, when in point of fact the retention of the stock had been due to what practically was a private arrangement with one beneficiary? Again, the separation of the two sums of £2000 each, not only in the original deed of bequest, but subsequently by the trustees in their accountings and management, looked like a holding by them of two separate trusts. This point was made but not apparently argued to the Lord Ordinary. When, however, the case came into the Inner House a majority of the three judges in the Second Division decided against Mrs. Robinson, and accordingly her reasons for suspension have been repelled and the interdict refused. It must not be forgotten that a division of the residue of the estate had been made by the trustees, and all parties had discharged them. "The scheme of the instrument," observed Lord Moncreiff, "was an immediate division of the residue, delayed only by the payment of debts and funeral expenses, and the investment of these sums (of £2000 each), and the power to continue existing investments, and the indemnity so carefully attached to it, were certainly not limited to a few months, and would have been quite unnecessary for that purpose. In this way this power not only includes the investment of these two sums, but was in fact intended for and applicable to no other purpose than that to which the trustees applied it."

Having thus disposed of the first point in the case, his Lordship went on to express an adverse opinion upon the contention of a separate trust. They did nothing, it was remarked, beyond their powers, "whatever investment they had selected, the separation of the two sums was in fulfilment of their instructions, and each was for behoof of the eventual fiars, as well as for that of the immediate life-interests." Lord Ormidale was of the same opinion, but Lord Gifford dissented, agreeing with the Lord Ordinary. Had the trustees right to invest (whether by new purchase or merely by continuing to hold it) any portion of these two legacies in bank stock? That, as Lord Gifford put it, is the main question, and his answer to it was negative. "I think it contrary to the very explicit powers and directions" given as to the two legacies, and "contrary to the very conception of these legacies themselves." This view Lord Gifford took, keeping, as is evident from his opinion, in full consideration the empowering clause, "to hold all or any such shares as she might die possessed of." The learned judge thought that this was merely a latitude given them so that they might abstain from selling for a reasonable time in the event, for example, of a period of commercial depression. "All this had reference to her general trust. It was for the benefit of her residuary legatees, who were interested only in the residue, and whose interest it was that the residue should not be hurriedly realized at a loss. It had nothing to do with the two special legacies of £2000 each, which were quite fixed in amount, and the beneficiaries in which had no concern how the residue might turn out, or whether the stocks in public companies were sold at a time of depression or not." We cannot help feeling much impressed by the cogency of these remarks; the absence of interest, however, in the legatees, though it seems to us sufficient as regards the trustees on the general trust question, is not present in like degree if we consider the view of the Lord Ordinary, that they surrendered their judgment in this matter of this part of this particular legacy. But going on further into the case, it seems to us that Mrs. Robinson's position becomes stronger and stronger. Even granting that the trustees had such a power to hold as might leave them with a claim against the trust estate, what does that claim amount to? The Lord Justice-Clerk observed that by the very constitution of the trust, these funds, these sums of £2000 each, were to remain trust funds, and indeed that is clearly the desire of the testatrix. But while they continue trust funds, yet it is the strong argument on the other side that they were expressly separated and set apart from one another. Truly, were there not two trusts created, one for each? We confess to inclining to that opinion, with all deference to the judgment pronounced. Suppose, in a case put from the chair of the Division, one of the investments or series of investments had done so well that the £2000 became £2500, and the other so ill that the £2000 became £1500, were the

trustees entitled or empowered to *equalize*? We cannot think so. Suppose again, while one remained steady the other increased largely, must the profit be shared, or must it go to residue (already settled up), or must it go to the legatee who had been so fortunate as to have investments made for her so profitably? The trustees, by getting from Mrs. Sinclair a personal obligation, and having ascertained her wishes on the subject, put all questions between her and Mrs. Robinson out of consideration; but then his Lordship pointed out that this was a different matter quite from the personal right of relief on the part of the trustees against the trust. "That is a direct debt of the maker of the trust, for which the whole of the trust funds in the hands of the trustees must be liable, and nothing that occurred in the course of these communications amounted to a discharge of that debt, or in any way affected or related to the right of the trustees to the indemnity which had been specially provided for them." This observation brings us to consider the other matter, as we venture to think the vital matter, of the separation of the trust. The whole of the trust funds may be liable, but that can be only *qua* trust funds of a certain trust, and the contention was that these two sums of £2000 had each been really formed into a separate trust. On the liability of Mrs. Sinclair's £2000 to relieve the trustees we are not arguing, we have already discussed this point, and it has, we think, less force than the other; but we agree with Lord Gifford when he says, "Mrs. Robinson, the present complainer, who had nothing whatever to do with that investment, who never consented thereto, and who never was consulted thereanent, directly or indirectly, is not liable for the loss which has arisen therefrom. I think that Mrs. Robinson and her children are well entitled to say, We had nothing to do with the mode in which you, the trustees, chose to invest the legacy belonging to Mrs. Sinclair and her children—you consulted them about that—you did not consult us. We were consulted about the investment of our own legacy, of the other £2000, and we consented to certain investments of that sum, but to nothing else." His Lordship went on to make observations as to the power of the trustees to allocate the sums and the investments to each of the sisters, and pointed out a grave difference between the directions of a testator who should say, "Invest my funds on loan for A. and B.," and those of one who, as in the present case, said, "I give you power to lend the legacy to A. and the legacy to B. respectively on security." In this view there was a separation and allocation of the two funds, or, as we think, practically the creation of two trusts substituted for the one originally declared.

The liquidation of the City of Glasgow Bank was the cause of another case to which we now propose to refer, namely, *The Liquidators v. John Gillespie and Others* (March 20, 1880, 17 S. L. R. 554). Mr. Gillespie (who though called as a defender did not appear) was the sole trustee under the marriage contract of Mrs.

Parkhurst when she entered into her first marriage with a Mr. Godby. The trust funds had embraced two policies of insurance on Mr. Godby's life, and when he died in 1856 a part of the funds was, to the extent of £500 of the stock, invested in the City of Glasgow Bank. This was an investment not authorized by the marriage contract. When the bank failed Mr. Gillespie was placed on the list of contributories *qua* trustee, and he surrendered his whole estate to the liquidators, who granted him a discharge, but were by the express terms of the arrangement placed absolutely in his position. Accordingly they raised an action against the beneficiaries for payment of the calls upon the stock held by the trustee whom they had now come to represent. The result of the pursuers' averments came to this, that while they could not deny that the deed of trust did not warrant their holding the stock, still Mrs. Parkhurst and her husband were in point of fact informed of the purchase of stock and "gave their sanction and approval," and had further received from the trustee states of the accounts showing the investments of the trust funds, so that they could not but be aware of how the matter stood. It should be further added that Mrs. Parkhurst had only a life-interest in the funds of the trust, the fee being in the children of the marriage, or in other specified persons should the spouses have no issue. The contention of the liquidators, as representing the trustee, came in point of fact to this, that they were by this non-resistance or acquiescence on the part of the beneficiary entitled to claim from her the repayment of all the calls upon the trust estate. The Lord Ordinary, taking even for granted all the pursuers' averments, and thus admitting everything they could possibly have established by a proof, refused to listen to their argument and assoilzied the defenders, concluding with these words: "The printed correspondence leaves the substantial matter of fact in no doubt, and I have assumed, as I hope I have made clear, that the pursuers' averments are exactly true. The defenders certainly knew of the investment, and were well satisfied with it. If this is sufficient to support the action, my judgment is wrong; and if not, a proof would apparently be superfluous." The pursuers, however, took their case to the Inner House, where the views of the Lord Ordinary were forcibly indorsed. The Lord President observed: "One quite understands that when a trustee is acting in the performance of his duty, and within the limits of authority, he is entitled to a full and complete indemnity for all that he has done, not from the beneficiary individually, but from the trust estate. . . . But that claim does not lie against the beneficiaries personally. The ground of it is that in the execution of the authority committed to him, and in the due performance of the duty which he has undertaken, he is entitled, like every other mandatory, to be kept scatheless." His Lordship went on to point out how Mr. Gillespie had clearly in this instance been in the position of a trustee acting not *within* but *beyond* his powers, that he had in a legal sense, "not using the term offensively," committed a



breach of trust, in respect whereof he would be personally liable to the trust estate. That is an intelligible position. The beneficiary might have claims against the trustee founded on his fault in the management of the trust funds, but this the Court pointed out was a completely different state of matters. In the case of the beneficiary seeking his remedy against the trustee who had acted beyond his powers, that beneficiary might by his personal conduct, by approval, by acquiescence, or otherwise, lose his right to recover. The peccant trustee might thus be saved the vengeance of the irate beneficiary. Here, however, the tables were to be turned. The trustee whose fault had led to the loss of the money was seeking to have himself repaid, "he is to be indemnified for the consequences of his own breach of trust by those who have lost their money by reason of that breach of trust. . . . That they, the persons sinned against, should by their mere conduct or acquiescence be held to take the place of the sinner, and to relieve him of all consequences of his transgressions, is an entire novelty." In his opinion Lord Deas seemed to consider that such an undertaking or obligation of relief could not have been proved unless by writing in express terms, while Lord Mure pointed out the absence of any averment that Mrs. Parkhurst and her husband, while acquiescing and receiving the dividends, knew that this investment was an improper application of the trust funds.

In the case of *Gilmour v. The Bank of Scotland* (March 19, 1880, 17 S. L. R. 533) one of the points decided was of some importance as regulating and defining the rules with regard to the liability of cautioner in a cash-credit bond for interest. The amount of the bond was £600, and when the bank as usual struck its annual balance in December 1878 the principal debtor was due £700 odd. In November 1878 he became bankrupt, and in January 1879 the bank called on one of the cautioners to pay £653, the amount of the bond with interest *from the date when they struck their last balance* before the bankruptcy. The cautioner demurred to paying interest save from the date of the intimation to him, but the Court held that the bank was right. The case, no doubt, turned largely on the terms of the cash-credit bond itself, but we find valuable observations on the leading authority of *Reddie v. Williamson* (1 Macph. 228).

Certain bill transactions with the British Linen Company's Bank at Inverness gave rise to a suspension at the instance of D. Mackenzie, Inverness, of a charge at the instance of the bank on a bill for £70. The question arose out of a bill for £76 discounted by John Fraser and purporting to be accepted by him, the drawers and indorsers being Mackenzie and another. When the bill fell due the bank gave notice to Mackenzie, who, however, did nothing, and did not reply to the notice. Fraser, within a day or two, appeared at the bank with a blank bill bearing the same signatures as the former one, and failing to get a renewal in full, he paid £6 on account, and the bill was filled up for £70. Again notice of protest for non-payment was given, but Mackenzie remained silent

until the bank having put the matter into legal hands, Mackenzie by his agent refused payment, on the ground that his signatures were forgeries. On further steps being taken he suspended the charge. The point turned upon whether by his actings he had adopted the bills and was thus barred from pleading the forgery or not. It was urged for the bank that he should at once have intimated that a forgery had been committed, especially as he knew that in a previous instance this had occurred. Fraser was tried for forgery and convicted. As the Lord President put it, if Mackenzie knew that his name had been forged on the first bill, and upon the faith thereof that the bank had discounted the paper, the case must be clear, and Mackenzie might even have been answerable criminally; but apart from that there was the question, whether "by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature." Upon the first matter the facts were very peculiar, and lead to an almost irresistible conclusion that the complainer did know something of this first bill, and had received a letter from Fraser, very ambiguously worded, no doubt, but still for the purpose of obtaining an interview and getting the matter tided over. Mackenzie maintained that of the renewal, of the second bill in fact, he knew nothing, yet there was his own admissions as to drinking with the forger the day he went in and charged him with the act; there was the recovery by him of the forged bill, preserved for him by a third party, into whose hands he placed it; there was a caution given, as he said, to Fraser not to put any new forgery in place of the old, and the assurance that the old bill had been paid in cash, when in another part of his evidence Mackenzie stated his knowledge of Fraser's impecuniosity, and above all, as it seems to us, there was the remarkable admission that the forger had been induced to lend him £4 that day. But the learned judge proceeded very cogently to put the case as to the second bill, showing how probable it was that Mackenzie knew of it, of its amount, and of the renewal, and of his name being upon it. He got the first notice from the bank, and went and reproached Fraser for having done what he said he had not done, but still he maintained silence. We can scarcely wonder that in such circumstances the Court upheld the claims of the bank, and decided that Mackenzie's conduct amounted to an accrediting of the signature on the bills, both the first and the second. Lord Shand, who differed, took the view that whatever moral obligations such proceedings might raise as to the person whose name was forged, there was no legal obligation, and that "silence, even obstinate silence, or inaction will not constitute adoption." To employ a term used by Lord Mure, what the decision came to was that there had been "virtual procuration" by Mackenzie. The facts were so peculiar, and the conduct of Mackenzie in the matter so suspicious, that the Court seem to have

given effect to what might in other circumstances prove a somewhat strained view of the duties of one whose name had been forged; but we confess that it must always arouse a suspicion, not perhaps necessarily of collusion, but of at least undue favour to the criminal, when a person whose name has been forged, and who has received notice of the offence, does not at once take steps to repudiate the false signature; and we cannot but remember that any such undue favour is being granted at the expense of those who may have advanced money on the strength of the forged name, and that the law looks with sternness upon all such transactions as savour of preferences unduly given.

The great spread of buildings and of building companies in and around Edinburgh gives rise to frequent litigations, of which we propose very briefly here to notice two. The first of these, *Barclay v. M'Ewen, etc.* (May 21, 1880, 17 S. L. R. 558), turned upon a question chiefly of the form of the titles, where the proprietors of the upper flats of a tenement of houses were bound to pay a proportion of the expense of keeping up "the pavement and iron railings in front thereof." The proprietor of the lowest story by his titles was infeft in the house, "together with the plot of ground in front thereof," and in a joint right with the other owners "to the area of ground on which it is built." He was also bound to pay for the whole upkeep of the parapet and railings. It was held that in these circumstances the upper owners had no right of property in the *solum* of the plot of ground, or in fact that the mere obligation to pay a contribution towards keeping up the railings, etc., did not confer upon them such an interest as would entitle them to prevent their neighbour below from taking the railings away and paving the plot of ground in the course of turning his property into shops. There was a further plea founded on the alleged injury to the amenity, as an answer to which we find Lord Ormidale saying, "No authority was cited to the effect that the upper proprietors of a tenement are entitled, in respect of amenity damage, to object to the owner of the ground-flat converting his property into a shop; and yet it is notorious and indisputable that such a proceeding is, and has been for many years, of frequent occurrence in the streets of Edinburgh."

The other case we have alluded to is that of *The Scottish Land and Building Co. (Limited) v. Shaw* (May 13, 1880, 17 S. L. R. 543). A man had damaged his hand and so could not write a missive offer to purchase certain houses himself, but got his brother to do it for him. The brother also signed it in his name *and by his authority*. It was, however, decided unanimously by the Lord Probationer, by the Lord Ordinary, and by the First Division that the offer not being holograph was not binding. "A sale of heritage cannot be effectually made except by writing, and by writing which is either tested or holograph." This is, undoubtedly, the rule of law, but we humbly venture to think that

with cases such as that we have just mentioned arising, the sooner such a rule undergoes grave modification the better for the commercial welfare of the country. It is very different now from the olden days when the chief transactions in heritage had reference to tracts of land, for now probably transactions in houses, and portions of houses, that daily pass from owner to owner, vastly in number exceed all the landed estates sold and bought in a year.

In the case of *Young v. Johnston and Wright* (May 19, 1880, 17 S. L. R. 545) two somewhat small points are worth notice. First, that the fact of a married woman living in adultery apart from her husband does not in any way prevent her having as *paraphernalia* articles which she would in ordinary circumstances have as such. Second, that even supposing a deed granted to be null and void *propter turpem causam*, a legacy to an innocent third party under the deed might perfectly well stand good.

A farmer in difficulties executed a private trust deed for behoof of his creditors in favour of a person named Kyd. The estate realized £2500, and the truster's mother, who claimed to the extent of £525, but had not acceded to the trust, raised a multiplepoinding to obtain the Court's decision upon the rights of the various creditors. The action was raised in the name of the trustee as nominal raiser, and reliance was put on a dictum in Bell's Commentaries (seventh edition, vol. ii. p. 391) for its competency. The Court, however, dismissed it, Lord Young observing that "by such a process the estate of any farmer in Scotland might be put under the management of the Court. Voluntary trustees cannot stand in the way of non-acceding creditors. The estate is in the hands of a trustee under a trust which does not affect them. They can use ordinary diligence against the estate."

In *Galt v. Macrae* (June 9, 1880, 17 S. L. R. 635) the Court dismissed an appeal against an interlocutory judgment of a sheriff in a question relating to the election of the trustee on a bankrupt estate, holding such an appeal to be incompetent and excluded by the statute (Bankruptcy Act, 1856, sec. 71). Three cases were quoted by the appellants as authorities in point, *Tennent v. Crawford* (5 R. 433), *Latta v. Dall* (4 Macph. 100), *Wiseman v. Skene* (8 Macph. 661), and certainly a reference to them would appear conclusive; but Lord Young, with whom the other judges concurred, in delivering the leading opinion in *Galt v. Macrae*, after pointing out how the statute had been enacted expressly to check the numerous appeals as to the votes, etc., at the elections of trustees in bankruptcy, added, "We have all great respect for authority. But this is a matter of procedure, and an error of procedure may be corrected after three such decisions as have been quoted. It is not a matter to which the maxim *stare decisis* applies."

Another point in bankruptcy law arose in *Huttons v. Dempster and Others* (May 26, 1880, 17 S. L. R. 581), where a man first granted a private trust deed for behoof of creditors, and subsequently

was sequestrated. The trust deed was granted in October 1878, and sequestration was awarded on June 14, 1879. It was decided that the sequestration superseded the private trust deed as a means of distribution of the estate, but not in so far as the trustee therein had earned and realized funds belonging to it. The bankrupt was not in a position to have asked from the trustee payment to himself, and naturally the trustee in bankruptcy could not do so either, his rights being only those of his author, the bankrupt.

In *Rose v. Spaven* (May 27, 1880, 17 S. L. R. 583), a case of money lost owing to the dishonesty of a legal firm, the question arose as between two persons who had been defrauded, which of them must bear the loss. It is not necessary to enter into the details of the series of frauds perpetrated by the agents, but they reminded us very much of similar questions raised by the similar frauds committed in *Traill v. Smith's Trustee* (3 R. 770), and the decision arrived at there was the same in principle, namely, that the person who placed the guilty party in that position in which he had been enabled to commit the fraud must bear the loss. We shall probably have to refer on some subsequent occasion to other actions arising out of the peccadilloes of this firm.

The decision in *Crosbie's Trustees v. Wright* (May 28, 1880, 17 S. L. R. 597) was one mainly founded on the special facts of the case, as the Court distinctly adhered to the previous authorities, such as *Cuthill v. Burns* (24 D. 849), *Miller v. Miller* (1 R. 1107), *Gibson v. Hutchison* (10 Macph. 923), and *Walker's Executors* (5 R. 965), which have established that a deposit receipt of itself will not operate as a bequest to the survivors, unless otherwise supported by facts or documents.

The powers of a general manager who when in charge of a mercantile business (but without any express authority to do so) borrowed money in the name of his principals and granted a bill of exchange blank accepted by him *per pro* of the firm, were discussed in *Sinclair, Moorhead, & Co. v. Wallace & Co.* The agent had power to draw and accept ordinary trade bills, but none, at least none expressly, to borrow money. The borrowing itself was peculiar, in the blank form, and the fact, not hitherto mentioned by us, that the bill was antedated some six weeks. The Court unanimously freed the principals from the liability which it was sought to make out their agent had imposed upon them. There was, however, it should be said, a second feature in the case, not perhaps of very much moment as it proved, but much founded on. The dishonest agent had paid in the proceeds of this bill to his employers' account, who were thus said to have been *lucrati*, and upon this ground to be liable to those who had been defrauded. It was shown, however, that the agent was at that very time largely indebted to them, and accordingly very probably this was done to cover temporarily his defalcations, "but," said Lord Young, "further than this, I am of opinion if there was no liability on



the employers to begin with, no liability was created by their receipt of the money under any circumstances."

How are casualties to be valued in the case of lands where the minerals are let for a period of five years? This was the point presented for decision in *Sturrock v. Smith, etc.* (May 21, 1880, 17 S. L. R. 562). The vassal was called on under the Conveyancing Act, 1874, to pay a composition on the death of the last-entered vassal for the constructive entry of a singular successor, and he maintained that the value of the minerals (then being wrought, and without any near prospect of exhaustion) should be ascertained and capitalized, a percentage on such capital value to be held as the casualty due to the superior. The minerals were let for £600 a year, and the Court declined to enter into questions of valuation and capital, but took the year's rent as the sum to be paid to the superior. In the previous cases of *Allan v. Duke of Hamilton* (5 R. 510) and *Sivright v. The Straiton Estate Co.* (6 R. 1208) there was no fixed rent between the landlord and tenant of the minerals; here there was, and the Court found in it a simple basis enabling them to deal with the matter just as though it were land-rent.

A curious and ancient right was the subject of inquiry in *Murray v. Peddie and Others* (May 25, 1880, 17 S. L. R. 570). Colonel Murray of Polmaise enjoyed under his titles a right of "one tide's fishing of salmon yearly," whenever he should "please to make" his "option," in certain reaches of the Forth belonging to the defenders. From 1676 the right had been exercised without any interruption. The defenders owned the salmon-fishings within the bounds, but their titles contained no reference to the right claimed by Colonel Murray. The Court took the view that the pursuer was not tied down as to any tide in the exercise of his right, but might "immediately after the conclusion of one tide's fishing, and seeing what the produce is, say, 'I will take that fishing as my selection.'" On the question of the validity of the right itself, without entering further into the matter, we may say that the decision in the case of *Scott of Scotstarvit* in 1763 was deemed sufficient to rule in favour of the pursuer.

The last decision to which we propose at present to refer was pronounced on June 10, 1880, by the Second Division in the case of *Young and Others v. Fergusson-Smith and Others (Nith Navigation Commissioners)* (17 S. L. R. 637). The steam-tug *Arabian*, belonging to the pursuers, had been injured owing to the defenders' operations in the bed of the river, and the owners obtained decree in 1876 for £150 damages and (recalling Lord Shand's interlocutor) for expenses, amounting to £171 odd, "against the defenders *qua* Commissioners, reserving all questions of personal liability in the event of the funds of the trust being insufficient to implement this decree." The Commissioners had no funds of the trust to meet the demand of the pursuers, and were further indebted

to Lord Herries and to Mr. Maxwell Witham in sums amounting to £5500, with almost £2000 more of interest as at July 1876. These advances had been obtained from these two gentlemen to enable them to carry out the operations authorized by their Act (51 Geo. III. c. 147). And also in accordance with the 55th section of the statute empowering them to borrow and to grant bonds with assignations of their rates and duties in security, the Commissioners had granted bonds to Lord Herries and Mr. Maxwell Witham containing assignations of "the rates and duties authorized by the said Act to be taken and levied, with power to demand and receive the same from the parties liable therefor; and also with power to demand and receive from the person or persons who may for the time be appointed and in the exercise of the office of collector and treasurer, . . . or other person receiving the same," etc. This being the state of matters, a fresh action of declarator, payment, and interdict was now raised by Young and his co-owners. Thus it will be seen there arose apart from the other point a question as to whether such a mode of proceeding by way of new action—or if it be preferred, a supplementary action—was competent. The Court decided that this was not a proper course, and held that a question of this kind as to personal liability of statutory trustees expressly reserved by decree must be decided in the same process and by the same judges as it was originally before. As to the other matter, that of the priority of the claim for damages to the bonds and assignations statutorily granted by the trustees, the Court held that such a contention by the pursuers was inadmissible.

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## CONTRACTS TO "SATISFACTION."

(*From the Albany Law Journal.*)

THERE are a number of interesting cases of contracts for the rendition of service or the manufacture of articles "to the satisfaction" of the recipient. The question has been discussed whether the power of pronouncing his dissatisfaction is arbitrary in the party, or exists only where in reason and good conscience he may be dissatisfied.

In *Zaleski v. Clark*, 44 Conn. 218; S. C., 26 Am. Rep. 446, a sculptor executed a bust of the defendant's deceased husband, under an agreement that she should not be bound to accept it unless she was satisfied with it. The bust was artistically executed, was a correct copy of the photograph furnished by defendant, and was a good likeness; but owing solely to want of colour in the material, lacked lifelike expression. The defendant alleged that she was not satisfied with it, and refused to take it. *Held*, that no action would lie for the price. Counsel addressed the following very ingenious and scholarly argument to the court:—

"The most that can be claimed is that the contract called for a

bust which should be satisfactory as far as the character of the thing ordered and the nature of the material to be worked upon would admit. That it was satisfactory in this respect the court expressly finds. The satisfaction to be met was a reasonable satisfaction, not a mere whim or caprice. That the bust when finished lacked the attractions of life and colour was no more a legal ground for dissatisfaction on the part of the defendant, who had ordered a bust to be made out of plaster, than the absence of heat and upholstery would justify a similar dissatisfaction on the part of one who had ordered from a mason-builder the four walls of a house, and on completion the residence a cheerless one. Such dissatisfaction in reference to works of art, certainly, is too much of the dreamy and poetic order to be properly the subject of legal recognition. In this poetic sense, as distinguished from the legal, it may not be improper to recognise it, and to give the defendant our sympathy, as was the case with Pygmalion, of mythological renown, who, a sculptor himself, was thus afflicted, and who, mourning over the one imperfection of his masterpiece, is represented by a modern dramatist as groaning out his dissatisfaction in this wise:—

‘No, the thing is cold, dull stone,  
Shaped to a certain form, but still dull stone,  
The lifeless, senseless mockery of life.  
The gods make life, the sculptor only death;  
The merest cutthroat, when he plies his trade,  
Makes better death than I with all my skill.’

“In consideration of the fact that the only fault found with the bust was that it failed ‘of the expression of the deceased during his life,’ and further that this failure of expression was due solely ‘to the nature of a bust as a dead white model,’ it is submitted that the dissatisfaction of this defendant and that of the mythological sculptor are identical.” It is highly probable, however, that even if the court could have animated the bust, as Venus animated the statue of Pygmalion’s woman, the widow would still have been dissatisfied with such a small fraction of her late lamented lord. But the court made short work of the sculptor. They said: “In this case the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that could possibly be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with

which the defendant ought to be satisfied, is one thing; an undertaking to make one with which she will be satisfied is quite another. The former can only be determined by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the defendant to make such a contract, but having made it he is bound by it." (Why did not the sculptor paint the bust, as the English sculptor Gibson was wont to do, and as the ancient Greeks probably did?) It rejoices us to be able to say, that the plaintiff on the new trial which the court granted got judgment, and that judgment was affirmed, 45 Conn. 397. The same testimony was introduced as on the first trial, and why the result was the converse in the Appellate court passes our comprehension. Perhaps the ingenious counsel, Mr. T. C. Ingersoll, can inform us.

The court founded this on *Brown v. Foster*, 113 Mass. 136; S. C., 18 Am. Rep. 463, where the plaintiff agreed to make the defendant a satisfactory suit of clothes, and the defendant having returned the suit as unsatisfactory, it was held that no action would lie for the price. The court there said: "Even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

In *Tyler v. Ames*, 6 Lans. 280, it was held that a contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when in his judgment the agent fails to meet that requirement of the contract. The court said: "The word 'satisfactorily' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as without such a clause he would have the right to dismiss the plaintiff if he did not properly perform his duties. The question is quite similar to the one that is sometimes

raised on chattel mortgages, containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favour of the right of the mortgager to take and sell the property without any obligation to prove that the facts and circumstances surrounding the parties justified him in deeming himself insecure. *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Rich v. Milk*, 20 id. 616; *Hall v. Sampson*, 19 How. Pr. 481; *Farrell v. Hildreth*, 38 Barb. 178." To the same effect on these last citations are *Huebner v. Koebke*, 42 Wis. 319; *Cline v. Libby*, 46 id. 123.

In *M'Carren v. M'Nulty*, 7 Gray, 139, the same doctrine was held as to a contract to make a bookcase, of a certain kind and of certain dimensions, "in a good, strong, and workmanlike manner, to the satisfaction" of one of the defendants. The court said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labour or furnish materials for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

In *Hart v. Hart*, 22 Barb. 606, a son agreed to support and maintain his father during his life, and covenanted that if at any time the father should become dissatisfied with living with him, the son would pay his board. *Held*, that the father had a right to quit the family of his son whenever he became dissatisfied, without showing a good excuse for leaving, and that it was for him to judge whether there was good cause for dissatisfaction. The court said: "It is a case where the law will not undertake to say for the party he must be satisfied and has no right to be dissatisfied with living in this family; for the party by the express terms of the contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family is a matter which the law will not assume to determine for him. Neither will it do the converse, and say he had no cause to be discontented and dissatisfied, and therefore he cannot be regarded as dissatisfied."

There are a few cases that look in the opposite direction:—

In *Wetterwulgh v. Knickerbocker Building Association*, 2 Bosw. 381, the defendant's articles provided that in case any member, by sickness, removal, or misfortune, become unable to pay his dues, he might withdraw, "and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned." *Held*, that the plaintiff was entitled to withdraw and a return of his money if he showed such facts as in law and good conscience ought to have satisfied the trustees.



In *Manufacturing Company v. Brush*, 43 Vt. 528, the action was founded upon a contract between the plaintiff and the defendant, by which the defendant was to take a sugar evaporator of the plaintiff upon trial, and pay for it if he liked it, the plaintiff to take it back if he did not like it. The court said: "The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it, and not with any reference to any usefulness of it for other persons. To this trial the defendant was bound to bring honesty of purpose; anything short of that would not determine his wishes fairly, but only his wilful caprice or his dishonourable design. To it he was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circumstances, and therefore was not bound to use the care and skill of ordinary persons in making the determination. His duty to the evaporator, as custodian of it, is not now here in question, but only his duty and liability under the contract concerning it. This duty was the trial of it, and payment for it, if on trial of it he liked it. To the trial the charge of the court required him to bring honesty of purpose and judgment according to his capacity to ascertain his own wishes, and refused to require the care and skill of ordinary persons in making that determination. This seems to have been correct."

*Daggett v. Johnson*, 49 Vt. 345, was an action for the price of milk-pans. The court said: "The contract of the defendant requested plaintiffs to deliver the pans to the defendant, and he agreed to pay them therefor \$80 on the 1st of July, '*if satisfied with the pans.*' We think the ruling of the court, that the defendant had no right to say, arbitrarily and without cause, that he was dissatisfied, and would not pay for the pans, was sensible and sound. The pans were made with appliances to graduate the temperature of the milk by running water, and in that consisted their excellence. Without these they were like other pans, save their greater capacity. All this the defendant well knew. If a man orders a garment made of given material and fashion, and promises to pay if satisfied, he cannot say that the garment, in material and manufacture, is according to the order, and yet refuse to test the fit or pay for it. He must act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject-matter and surrounding circumstances. His dissatisfaction must be actual, not feigned; real, not merely pretended. *Manufacturing Co. v. Brush*, 43 Vt. 528."

## SUMMARY JURISDICTION.

## II.

It results from what has previously been said that in Scotland magistrates have no power to reduce terms of imprisonment or amounts of fine which have been fixed by statute; and that the law with reference to the power of the public prosecutor to limit penalties and to the power of the magistrate to dispense with penalties is in a vague and uncertain state.

There is, however, in the Scottish magistrate a very remarkable power to vary penalties in another direction. He may direct immediate imprisonment where the statute defining the offence authorizes imprisonment only on default in payment of the penalty imposed. The authority for this proposition is *M'Dowell and Macleod v. Davidson* (1 Couper, 9). The offence there was against the Salmon Fisheries Act of 1844, which authorized imprisonment (for a period not exceeding six months) only on failure to pay a penalty within fourteen days after conviction. The conviction adjudged the panel to pay 10s. of penalty and £6 of expenses, and in default of immediate payment adjudged the panel to be imprisoned for twenty days "unless the said sums shall be sooner paid." It was argued that this conviction was not authorized by the terms of sec. 19 of the Summary Procedure Act, 1864. The Court, however, rejected this argument and upheld the conviction. Lord Ardmillan said, "Under former Acts a period of fourteen days was allowed for payment, and during that time the convicted parties might escape. One of the objects of the Procedure Act was to prevent that." And Lord Cowan said, "There was here an express power to decern for a modified penalty recoverable by poinding and other execution, and the respondent was here liable to imprisonment in default of recovery for a period not exceeding six months; and by the latter part of the section" (that is, sec. 19 of the Procedure Act, 1864), "where the penalty is so recoverable, the Sheriff is empowered to issue his warrant for the immediate imprisonment in lieu of granting a warrant of poinding and sale." The danger alluded to by Lord Ardmillan is no doubt a very real one; and the policy of sec. 19 is further indicated by the direction that no sale is to be made by virtue of a warrant granted under the Act unless the goods are sufficient to satisfy the penalty and expenses. The Court, however, cannot know the value of goods before they are appraised by the officer of Court, nor can the Court estimate the probability of a convicted party escaping. It is difficult to see how in pronouncing sentence the judicial discretion can be exercised on either of these points. And if it be impossible to exercise a judicial discretion, arguments founded on the policy of the Act and appealing to that discretion lose much of their weight. As matter

of construction, sec. 19 evidently refers to a case in which but for the provisions of the section it would be the imperative duty of the magistrate, having imposed a penalty, to grant warrant for poinding. In place of such a warrant it authorizes the substitution of immediate imprisonment. The section cannot be understood as applying to a case in which the magistrate was entitled to select between penalty and imprisonment without the option of a fine. But does it apply to a case in which the only power to imprison was on default in payment or recovery after a time certain? or is it not confined in terms to those cases in which the magistrate was entitled to offer to the convicted person the alternatives of payment and immediate imprisonment? The arguments *hinc inde* are obvious. On the latter construction, it is said, the power given by the section was not required, as power to imprison immediately already existed. But to this it seems a sufficient answer to refer to the opposing construction. The section may not be confined to cases in which the power already existed, but it certainly includes them. On the other hand, it is a sweeping and revolutionary measure to confer upon the amateur judges who administer the largest part of the criminal jurisdiction a general power to convert pecuniary penalties into terms of imprisonment. This is something totally different from, indeed it is opposite to, the principle of intrusting to the magistrate a discretion within limits as to the amount of either fine or imprisonment, or even the power to reduce the punishment from imprisonment to fine or penalty. Against such discretionary powers the panel requires no protection, for they can be exercised only to his advantage; but against the power of individual magistrates to increase the severity or alter the character of the punishment, the panel requires the protection of the usual clauses defining the maximum amount of punishment. But the object of all such clauses is to some extent defeated if, apart from the provisions of particular statutes, either at common law or by virtue of the provision of a general statute, the magistrate may convert penalty into imprisonment. It is no doubt true that in many imaginable cases it may be really a merciful thing to send a man to prison if the alternative is, for instance, to distress his household by a sale of necessary furniture. We have already expressed a doubt whether the expediency of not granting execution against moveables can be very accurately ascertained by the magistrate when pronouncing sentence. But such cases are exceptional and would not justify the general power to alter the character of sentences which is claimed under, and indeed decided to be given by, sec. 19 of the Procedure Act. It does not seem to matter much to the panel whether a sentence of imprisonment is described as being by way of recovery of penalty, or as *in modum pœnæ*. The galling fact of imprisonment is the same, whether the prisoner knows that he is paying the fine by his personal suffering (which is *in modum pœnæ*)

or whether he knows that he might be liberated in due course of law by paying a sum which he cannot raise, or which possibly the imprisonment has destroyed his only chance of raising. That a definite or indefinite term of imprisonment can be shortened by payment is of course a most important distinction to those who can pay or get the money from their friends (and friends sometimes grow cool towards a man who has got into gaol), but it does not affect the general observations we have made. One construction of sec. 19 may be suggested, which is perhaps not open to some of the difficulties indicated above. It may be assumed that the power to imprison immediately given by the special Act is purely a power of recovery, and must therefore be expressed as "until liberated in due course of law," or "unless sooner paid;" while, on the other hand, the power to imprison immediately given by the Procedure Act is a power to punish by a definite term of imprisonment without reference to the payment or non-payment of penalty. This would not avoid the objections of principle which we have stated, but it would render less unintelligible the provisions of the statute. It was, however, rejected in *M'Dowell's* case, where the immediate imprisonment was "unless the same shall be sooner paid," *i.e.* paid before the expiry of the limited period of imprisonment; and the conviction was sustained without observation on this point. That what sec. 19 authorizes is instant execution by imprisonment also appears from the case of *Holland* (5 Irv. 561).

The next important point dealt with by the Summary Jurisdiction Act, 1879, is the scale of imprisonment for non-payment of money. Sec. 5 of the Act contains such a scale. The two limits are that where the fine, which is not paid or recovered, does not exceed ten shillings, the imprisonment is not to exceed seven days; and where the fine exceeds £10, the imprisonment is not to exceed three months. This scale will apply to every case, whether under the Act of 1879 or under any other Act past or future, and it will displace express enactments to the contrary (*i.e.* authorizing different terms of imprisonment on default) in previous statutes. It would at first appear that there is too rigid a uniformity about such a general scale for all classes of offences. It may be said, if Parliament has thought right in a variety of statutes, creating or defining offences, to prescribe extremely different periods of imprisonment on default, this must have been from a consideration of the differences in the nature or character of the various classes of offences, or of the delinquency involved in the non-payment of the various fines imposed, or of the compulsitor required to enforce payment; and it is therefore improper to reduce all such imprisonments to one level. But the section prescribes only maximum periods. The twofold object is thus gained of allowing a considerable latitude to the discretion of the magistrate who hears the complaint and imposes the fine, and at

the same time of protecting convicted persons, who are sentenced to pay fines, against oppressive and unreasonable periods of imprisonment on default, which might readily occur in the large number of cases where the statute does not define the period. The principle of such a general scale is not new in England. It occurred in the Small Penalties Act of 1865 (28 and 29 Vict. c. 127), but in the present Act a considerable reduction has been made on the maximum periods. In Scotland there is no such general scale. The periods of imprisonment on default in payment depend on the provisions of the special Acts. One common provision is that at the end of a specified period the convicted person shall be entitled to liberation though the penalty has not been paid; and where there is no such provision, and no special provision made for recovery of a penalty, and also where the penalty is recoverable by "action, civil process, or diligence" (whatever these wonderful alternatives may mean), the Procedure Act, sec. 18, sub-sec. 6, authorizes a warrant to detain "until liberated in due course of law," but this warrant is not given until after the period allowed for execution. In proper criminal cases, indeed, the specification of a period at the expiry of which the prisoner is to be discharged, whether or not the penalty is paid or caution found, is an integral part of a sentence under Sir William Rae's Act. And immediate imprisonment "until liberated," etc., seems now to be competent wherever the special Act does not expressly exclude imprisonment.

This is the effect of the decision in *Murray v. Jones* (2 Couper, 284). Mr. Moncreiff in his work on Review in Criminal Cases challenges the soundness of this decision on another ground. It appears that the judgment in that case specified the term of imprisonment, although the special Act did not do so. This was probably not in terms of the Summary Procedure Act, as Mr. Moncreiff suggests, and the sentence ought to have been "until liberated," etc. But if the substance of the matter, and not mere phraseology, is looked to, there is in one sense little difference between the two forms of sentence, so long as the power remains to terminate the imprisonment by payment of the fine. In the one case the period is definite, in the other indefinite. In the one liberation takes place at the expiry of the period without reference to the payment of the fine; in the other the period terminates only with payment of the fine in some form. In the latter case both fine and imprisonment are suffered; in the former it is by no means clear that the liability for the fine ceases when the specified term of imprisonment has been endured. It is no doubt said to be execution, but it is execution for the purpose of securing payment. There are differences between the two forms of sentence, but they have this in common, that in both the alternative lies with the convicted person. In neither is he sent to prison if he is able and willing to pay; and in both probably he may terminate his imprisonment by payment



after it has begun. There is no authority on the question whether, after a specified term of imprisonment has begun, payment of fine will have the effect of liberating, or whether the payment must be made before the imprisonment has begun. On principle there can be little doubt that payment at any time will terminate the imprisonment. The sentence in *Murray's* case was, "unless the said penalty is sooner paid." It may be that in practice these words are regarded as meaning before the warrant to imprison is executed. But this is not their proper meaning. Such an interpretation would practically convert the power to imprison by way of execution or for recovery of penalty into a power to imprison without the alternative of penalty. In a large number of cases it must obviously be impossible for convicted persons to make instant payment of the penalties imposed.

The Summary Jurisdiction Act (sec. 5) directs that the imprisonment imposed according to the general scale in lieu of fine is to be without hard labour, unless where such is authorized by the special Act, and then only if the Court think the justice of the case requires it. This is a humane provision, scarcely necessary in the case of hard labour not being authorized by the special Act, because then there would be no warrant for the hard labour, and a sentence containing it would be totally bad. The important part of the section is that which gives the Court a general power to dispense with hard labour (where that might legally be imposed) according to the justice of the case. There is on this subject no general provision in the Summary Procedure Act of 1864, the 18th section merely declaring that where any statute requires it the Court may add to the warrant of imprisonment a direction to keep the prisoner at hard labour. If a general law to the effect stated were extended to Scotland it would no doubt prevent such questions rising as occurred in the cases of *Ferguson v. Thow* (4 Irv. 190), and *Tague v. Smith* (5 Irv. 192), previously noticed. It was discussed there whether hard labour was so essential a part of the punishment provided by the statute that it might competently be omitted from the complaint by the procurator fiscal, or was not an aggravation which it was in the discretion of the magistrate to award or not. In the one case, under the Poor Law Act of 1845, it was held that hard labour was merely an aggravation, but it was not laid down as general law that hard labour, by whatever statute imposed, is merely an aggravation. Indeed, in *Ferguson's* case the sentence, pronounced under the Master and Servant Act of 1824, was suspended because it did not contain hard labour. Probably the greater number of statutes creating offences and authorizing hard labour as part of the punishment are expressed "with or without hard labour" so as expressly to confer a discretion in the matter. If this be so, there is the less reason why the same discretion should not be extended to all cases; and it may be added that it is for many reasons preferable that such questions of

remedy, procedure, punishment, etc., should be regulated by general statutes, from which the necessary exceptions, if any, may be made by special statute.

The next important provision of Sir Richard Cross's Act is to the effect that sums of money recoverable before the justices on complaint and not on information are to be treated as civil debts; *i.e.* no warrant of imprisonment issues as matter of course on default in payment. The new legislation will be found in secs. 6 and 35 of the Act of 1879. Its effect is very much to put small debts recovered before the justices in the same position as other debts. Just as under the Debtors' Act, 1869, a limited power to imprison for six weeks or until payment is given to the County Court judge, the debt being due under the judgment or order of a competent court, so now in the Justice of the Peace Court, if default in payment is made under an order directing payment, a similar commitment may be obtained only upon proof that the defaulter has, or had since the date of order, the means of paying, and that he refuses or neglects to pay. For the purpose of comparing these provisions with the law of Scotland it is unnecessary to determine exactly in what cases a sum of money is in England properly recoverable by information, and in what cases by complaint. The general distinction is between criminal and civil proceedings, although the English complaint may possibly be used for the recovery of sums which would in the language of the Summary Procedure Act be described as penalties or in the nature of penalties. About the law of Scotland there is no doubt. Wherever the sum sought to be recovered is a penalty, or of the nature of a penalty, then the machinery of the Summary Procedure Act, and particularly of secs. 18 and 19 thereof, and relative schedule, applies, and a warrant to imprison, either immediate or on default of payment or recovery, either for a term specified or "until liberated," etc., is competent in every case. Further, it is quite settled by the case of *Lawson v. Jopp* (15 D. 392), if indeed it was ever doubted, that penalties decerned for on conviction of a statutory offence are not civil debts within the protection of 5 and 6 Will. IV. c. 30, and therefore that recovery by imprisonment is perfectly lawful though the pecuniary amount of the penalty is less than £8, 6s. 8d., exclusive of interest and expenses. But as regards all sums above £8, 6s. 8d., for which the decree of a court or a registration decree of consent has been obtained, the ordinary common law of Scotland applies that the money may be recovered by all the forms of personal diligence; and it is not the common law of Scotland that a creditor must discuss the estate of his debtor before he proceeds against his person. The law of England, on the other hand, while giving greater facilities for the attachment of real estate in execution of debt, has, partly under Lord Campbell's Act of 1838 and chiefly under the Debtors' Act of 1869, reduced the remedy of diligence against the person to a very narrow scope; but

sums recovered by summary complaint before the justices were apparently left in a different position. Assuming that all sums considered by Scottish law to be penalties would in England be recovered by information, it may be inquired in what cases in Scotland, if any, is it desirable on the analogy of secs. 6 and 35 of the English Act of 1879 to restrain the operation of personal diligence at common law? There may be many classes of such cases, but no public inquiry has taken place. Indeed no public inquiry took place in England, and the Act of 1879 was passed very much on the personal responsibility of the Home Secretary, who had no doubt availed himself of the official channels of information upon the subject. Some difficulty has occasionally been found in Scotland in deciding on which side of the boundary line between penalty and sum of money due a particular case falls. Thus, in the case of *Holland v. Gauchalland Coal Co.* (5 Irv. 561) it was held that the provisions of sec. 19 of the Summary Procedure Act, 1864, applied to a case of compensation awarded under sec. 9 of Lord Elcho's Master and Servant Act, 1867 (30 and 31 Vict. c. 141), against a collier for absenting himself from his master's employment without just cause or lawful excuse. The form of judgment in that case was a conviction, and it was certain that the Summary Procedure Act might be competently used under the Master and Servant Act. The magistrate might in terms of sec. 9 have imposed a fine, but he gave a decree for compensation. The Master and Servant Act itself provided that sums of money might be recovered by, *inter alia*, imprisonment subject to the provisions of the Procedure Act. The Court held that compensation was certainly not a penalty, but that the machinery for recovering penalties had been made applicable by the statute of 1867 to the case of compensation. In *Robertson v. Duke of Athole* (1 Couper, 348) the complaint was taken under the Dunkeld Bridge Act of 1803, in which of course there could be no reference to the Procedure Act of 1864. The complaint was not merely for penalty and expenses, but for damage done by malicious destruction of property. The act here causing the damage was one criminal by the common law of Scotland. Besides this the Bridge Act authorized imprisonment on default in paying damages; at least so the High Court held upon construction. The Lord Justice-General said, "It is all a penalty: the whole thing added together is a penalty or fine. It is a punishment for a criminal offence; and I do not know what a penalty is, if the pecuniary punishment of a criminal offence is not." And Lord Ardmillan, speaking of the fine and the damages, says, "It does not enact these as two separate or separable things. It enacts them as forming in combination the proper penalty which the law awards for the offence which the statute creates, that offence being a violent and a malicious act." In *Local Authority of Selkirk v. Brodie* (3 Couper, 400), in which case, however, there

was a serious difference of opinion on the Bench, it was held that an appeal was competently taken to the High Court under the Summary Prosecutions Appeals Act, 1875, in a petition under sec. 105 of the Public Health Act to recover from a proprietor the cost of works executed by the Local Authority under sec. 24 of the Act. This involved that the petition, though merely asking decree for a sum of money, might have been brought under the Summary Procedure Act. The Act of 1867 authorizes imprisonment for a specified period in default of payment in a proceeding under sec. 105. It would rather appear that in this the substance of the penalty was absent, viz. some wrongful act or neglect for which the sum of money may be said to be the penalty or fine. The leading definition of penalty in the Summary Procedure Act (sec. 2) is, "any sum of money which may under the authority of any Act of Parliament be recoverable from any person in respect of the contravention of a statutory requirement or prohibition." It must be kept in view that it is only for purposes of jurisdiction, for deciding to which Court an appeal lies, that the 28th section of the Summary Procedure Act defines proceedings as criminal or civil by the warrant to imprison appearing in the conviction. The section itself assumes that many complaints (it may be for penalties) are for the purposes of appeal civil proceedings. The forms of execution (precisely similar) authorized by the 13th section of the Small Debt Act and the 9th and 11th sections of the Debts Recovery Act are too familiar to require more than reference. In these cases, and indeed under the Personal Diligence Act, in every money decree issued in Scotland, there is expressed or implied a power to imprison. It is therefore idle to contend, as was done in the case of *Brodie*, that the possibility of granting a warrant to imprison to aid the recovery of a sum of money stamps that sum of money with the character of a penalty. Indeed we have stated it as an important and interesting question in what class of decrees for civil debt the power of instant imprisonment ought to be relaxed. Our impression that the Act 5 and 6 Will. IV. c. 70, excluding imprisonment for sums below £8, 6s. 8d., has been found in Scotland a very fair protection against the abuse of diligence against the person. But the general question has been raised in the Fraudulent Debtors' Bill of this Session; and although no evidence on this feature of it was laid before the Select Committee, it is to be hoped that the Scottish legislators will not forget to look at the Act of 1879.

(To be continued.)

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## Reviews.

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*Supplement to Dr. John Cook's Styles of Writs, Forms of Procedure and Practice of the Church Courts of Scotland, bringing down the Law of the Church to 1880.* By the Rev. G. Cook, B.D. Edinburgh: T. & T. Clark. 1880.

THIS is a collection of the Forms, Styles, etc., indicated in the title, and will no doubt be of service to those for whom it is more immediately intended. It would, however, have been rendered much more easy of reference had there been a table of contents, or some means of readily finding out the particular information required.

*Rivista penale di Dottrina, Legislazione e Giurisprudenza.* Volume xii. fascicolo ii. Maggio 1880. Firenze.

THIS is a monthly number of a Criminal Law Review published in Florence. It extends to more than one hundred pages of closely-printed matter, and deals largely in italics and double columns. The Review itself is now in its sixth year of life. It covers a great deal of ground. There is a section devoted to the science of penal law. Again, a careful watch is kept over criminal legislation both in Italy and abroad, with a special view to hints for improvement at home. The conductors seem to plume themselves chiefly on their labours in respect to the project of a new Italian penal code, which has been simmering for the last six years. Then there are reports of cases in Italy, France, Belgium, Spain, Austria, and Germany, collections of foreign codes, reports of Parliamentary discussions, occasional notes and notices of books. All this is to be had for less than half-a-crown a number. It is sad to have to acknowledge that, among the score of foreign contributors whose names are given, there is not one representative of the English tongue; not a man to stand up for *habeas corpus* and the "palladium of English liberty." One of these learned persons hails from Malta, where he is probably interested in administering the code which the late Sheriff Jameson helped to frame; but Guiseppe Falzon can scarcely be the name of a man who is entitled to stand up for the institutions of his fellow-subjects in the sister isles of Great Britain and Ireland.

How is it possible to account for the quantity of periodical legal literature in Italy? In England, if we do not include the Law Reports, there are no more than three or four legal periodicals, none of them of a high class. In Scotland we cannot count more than two. In Italy, on the other hand, it would seem as if every little ambitious country town had its law journal. Rome has only one, but Turin has two, and Florence three. Naples, Milan,



Modena, Palermo, Messina, Catania, Venice, Bologna, and even Trani, and Reggio-Emilia have each one. Few if any of these are of the high class to which this present Review belongs. Yet does not the very existence of all these *brochures* indicate that the old Italian aptitude for law has been revived in the new kingdom; and may we not expect better results from the comparative method adopted by this Review than from the happy-go-lucky mode of legislating which prevails on this side of the Channel, thanks to our insularity and our habit of thinking of ourselves as leagues ahead of the rest of the world in all the elements of civilization?

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### The Month.

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*Lord Justice Bramwell on Employers' Liability.*—The following letter has been addressed by Lord Justice Bramwell to Sir H. Jackson, Q.C., M.P.:—

When a new law is proposed, it may seem to some of little consequence what is the old law, or the reason for it. The only question, it may be said, is, Will the new law be good? I should not think so. Those who propose to make a law, in truth propose to alter what exists, and should give a good reason for the change in all cases. But most certainly should they do so when the new law is proposed on account of some alleged hardship or anomaly in the old law.

This is the case in the proposed alteration of the law as to the liability of employers for negligence of a servant causing damage to a fellow-servant. It is said that the existing law is anomalous, and that it is an exception to the general rule that makes employers liable for the negligence of their servants, a grievance to workmen, and a grievance without justification. It is somehow supposed that, as a matter of natural right, something that exists in the nature of things, employers are liable for injuries occasioned by their servants' negligence, and that to except fellow-servants from this rule is unjust and unreasonable.

Now, this is an entire mistake; and it is really wonderful how not only those who are not lawyers, but lawyers who ought to know better, are under the impression I have mentioned. It becomes necessary to begin at the beginning, and state some entirely elementary rules of law.

The primary rule is, that a man is liable for his own acts, and not for those of others. A man, as a rule, is no more liable for the wrongs done by another than he is for his debts. The cases in which he is liable are exceptions to the rule, and not the rule. I will proceed to state the exceptions.

1. When a man undertakes to do or perform any work, he undertakes that it shall be done or performed with reasonable care and skill. If he does or performs it himself, and is negligent or unskilful, and damage results, he is liable. So he is if he does or performs it not himself, but by agent or deputy. For instance, if a smith's servant, in shoeing a horse,

hurts it by negligence, the master is liable; so would he be if he got a neighbouring smith to shoe the horse, and he injured the horse by his negligence. So a railway company that undertakes to carry a passenger from A. to B. is liable for damage occasioned to the passenger by the negligence of its servants; so, also, is it liable if the damage was occasioned beyond its own line, by the negligence of the servants of another company who were the agents of the first company for the completion of the journey. For example, if the contract of carriage was from London to Inverness, and part of the journey was in the carriages and with the servants of a Scotch railway company, the first company would be liable on their contract that due care should be used throughout. In these cases no question of master and servant arises; the question is one of contract. He has contracted that a certain thing shall be done in a certain way; he has not done it according to his contract, either by himself or his deputy. The reason of this liability is obvious. The parties have contracted for care. In this case the servant or agent is not liable.

2. The next case in which a man is liable for the act of another which causes injury is, where he has caused or commanded that act. If A. orders or procures B. to beat C., A. is as much liable to C. as though he, A., had given all the blows. So if a man employs a builder to build a house of such a size, and in such a place, that, when built, it will obscure his neighbour's lights, he is as much liable as though he built the house with his own hands. This class of cases also has nothing to do with the relation of master and servant. The employer is equally liable whether the person who did the act complained of was his servant, or his agent, and not his servant. In this case the actual doer of the act—viz. the builder who built the house, the man who actually did the wrong—would also be liable. The reason of this rule is obvious. The wrong has been done by him who procured it as much as by the actual doer, and the maxim *qui facit per alium facit per se* applies.

3. There is a third class of cases in which a man is liable for the act of another. If a servant—acting within the scope of his authority—by negligence injures one of the outside world (an expression I will explain presently), his master is liable. It will be observed that four things are necessary to constitute this liability. First, the actual doer of the mischief must be a servant of the person sought to be made liable. It is not enough he is employed, if not as a servant. If I employ my servant to pull down a wall, and, by his negligence, he injures a passerby, I am liable. If I employ a firm of builders to do it, I am not liable. The same thing is true if I employ a working bricklayer. I do not know that it is necessary to define or describe a servant. Shortly, the relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases, then such a person is not a servant. Next, the servant must be acting within the scope of his employment. If my coachman takes my carriage and horses to give his wife a ride, and is guilty of negligence causing damage, I am not liable. Next, the damage to be recoverable against the master must be the result of negligence. If caused wilfully, the master is not liable. If my coachman wilfully drives against any one or his carriage, I am not liable for the damage resulting. Lastly, the person injured, to have any remedy, must be one I have called of the

outside world. The master is not liable to any one with whom he has entered into some relation, unless such liability was one of the terms of that relation. Thus, if my servant drives over a stranger, I am liable. If my friend is having a drive with me, and is injured by my servant's negligent driving, I am not liable, because it is not one of the terms of our relation. If the passenger had paid me money to carry him, I should be liable under the first head of liability, because I had contracted with him that he should be driven with care. If my servant leaves a stumbling-block in the street, in the course of his work, and anybody falls over it, I am liable. If he leaves a trap-door open in my house, and my guest falls through, I am not liable. The reason why I am not liable in the cases in which I am not, is the general one I started with—viz a man, as a rule, is not liable for the acts of others. But why is the master liable in the case in which he is—viz to the outsider? Many reasons have been suggested. It has been said he is liable because he has given the wrongdoer the means of doing the mischief. But that is not so. For if the act is wilful, the master is not liable, though the means of mischief are the same. Nor is a man liable who lends his carriage to a friend, however unskilful, who drives over and damages a third person. Then it is said the master is liable under the second head of exception I have mentioned—viz *qui facit per alium facit per se*. But that is not true. Because the negligence, the wrongful act, may be contrary to the master's express orders. I tell my servant never to drive in at a gate with "out" on it. He does, and causes damage; I am liable. He drives without a lamp, contrary to my orders; I am liable if damage ensues. Another reason, ironically given, but which has great practical effect, is that the master is liable because he is a competent paymaster, while the servant usually is not. There is another reason which exists in fact; whether good or bad is another matter. A man is walking on the Queen's highway, and is run over by my servant. He may say, with some colour of fairness, "I was doing what I had a right to do. I was injured by your servant. I had no voice in the choice of him. I could only keep out of the risk of injury from him by foregoing my right to walk in the public streets. Therefore, to make you and other masters careful in the choice of servants to whom you give the means of mischief, you and other masters must compensate for that mischief when it happens." Now, I do not say that is a sufficient reason, but it is the only one I know of, and it is not a reason applicable to the case of one servant injuring another, for then each servant has a voice in the matter. The master hiring a servant says, "Here is your work, here are your fellow-servants; work for me or not, as you please." The servant may say, "I do not please so long as So-and-so is in your service, for he is negligent."

There is, then, no general rule which makes one man liable for the negligence of another. The general rule is the other way. There are exceptions. The case of one servant injuring another is not within those exceptions nor the reason of them, but the contrary. It has been said that the servant contracts himself out of the right of compensation. It would be better to say he does not contract himself into it. He can if he and his master agree. Nay, he can stipulate for compensation where there is no negligence. He does not contract that his case shall be an exception to the general rule that a man is not liable for the acts of

another. There is no injustice in this. There is in the proposition the other way. For no one can doubt that the dangers of an employment are taken into account in its wages. No one can doubt that the unpleasantness and risk of a miner's work add to his wages. Put sixpence out of his daily wage of five shillings as being on account of that risk—a sum which he may save or use as a premium of insurance. What is the proposal of those who would make the employer liable but this, that the servant shall keep the premium in his own pocket, and yet treat his master as the insurer? I do not believe that this is understood, or it would not be asked for; but it is the truth.

So much for the existing law, and so much for the reason of it. Now for the proposed change and the reason of it.

The largest proposed change is, that the master should be liable to his servant for the negligence of a fellow-servant. Why? I have shown that the supposed grievance does not exist. That it is not a natural right that the master should be liable, nor anything that exists in the nature of things. That it is reasonable a railway company should be liable to a passenger for the negligence of its servants, because it has so contracted; and that it should not be to one of its own servants, because it has not so contracted. We are to start afresh, then, and make a new rule. Why? Why if I have two servants, A. and B., and A. injures B. and B. injures A. by negligence, should I be liable to both when, if each had injured himself, I should not be to either? There can be but one reason for it—viz. that, on the whole, looking at the interest of the public, the master, and the servants, it would be a better state of things than exists at present. Is that so? Now, we must start with this, that it is under the present law competent for a servant to stipulate with his master that the master shall be liable for the negligence of a fellow-servant, or in respect of any hurt or injury the servant may receive in the service. So that the difference in the law, if changed as proposed, would be this. At present the master is not liable, unless he agrees to be; on the change he would be unless he and the servant agreed he should not be. For I suppose it is not intended to forbid the master and servant contracting themselves out of the law. That is to say, if a man prefers to take 5s. a day and no liability for accidents, rather than 4s. 6d., and the master prefers the former terms, it is not, as I understand, proposed to prevent their entering into a binding agreement to that effect. That would be a most mischievous interference with the freedom of contract, and would give rise to gross injustice and fraud on the master. I cannot suppose anything so outrageous, and proceed to consider what will follow if the liability is optional, but to exist where the parties have not agreed to the contrary. Every prudent employer of labour will immediately draw up a form to be signed by his workmen that the master shall not be liable for a fellow-servant's negligence. Or he will hire men somewhat on these terms: "5s. a day, and no liability; 4s. 6d., and liability, and I will either compensate you myself, or apply the 6d. to an insurance for you." I have put 6d., but I believe the difference of a farthing would make the men choose no liability. The present claim for liability, I repeat, arises from the workman not appreciating that he receives the premium now, yet would make the master the insurer.

The great employers of labour will understand the change in the law

and guard against it. The mischief and wrong will be in the case of men who, not knowing of the change, will go on paying the wages which include the compensation for risk, the premium of insurance, and yet find they have to pay compensation when the risk happens, and that they are insurers though they have not received the premium.

What good will the new law do? None to the workmen, except in such cases as I have last mentioned—cases of surprise and injustice. For, where it is known, it will be guarded against. And even if the law were made obligatory in spite of bargains to the contrary, it would not profit the servant. Because it is certain there is a natural rate of wages, one fixed by what neither master nor man can control, and that if they are practically added to one way, they will be taken from in another. If a manufacturer's wages now are £10,000 in the year, and he is made to pay compensation to the amount of £1000 a year, his wages will fall to £9000. He cannot charge more for his produce because he has to pay more; and if he could his sales would diminish, and injury be done to the workman in loss of work.

What good, then, will the change do? The only thing I have ever heard suggested is, that it will make the master more careful in the choice of his servants. I suppose it would. For it would not have an opposite tendency. But is it just or reasonable that for this small good masters should be made liable to the extent intended? that, to prevent one accident through careless hiring of an incompetent fellow-workman, the master should pay a thousand compensations where he has done his best to get careful men? Is he not under sufficient inducements to be careful already? How rarely does an accident happen to the workman without mischief to the master, and without an appeal to his charity? Further, I ask, would the workmen like that system which has prevailed in some employments, and to which the masters would be obliged to have recourse—viz. not employing a workman unless he produced a certificate of competency and fitness from his former employer? Still further. If some good would be done in this way, would there not be more mischief in another? Every one knows the recklessness bred by familiarity with danger. The man who would not open his lamp in a mine at first, will do so after a time. Another thing. It is a respectable feeling, though mistaken, which prevents servants doing what they call "split" on each other, the consequence being that negligence, leading to danger, by one workman, is concealed from the master by the others. Now, I do not say that workmen will injure themselves for the sake of compensation; but I do say that whatever tends to lessen their reason for care and good conduct, as compensation would, tends to make them less careful in themselves and more disposed to conceal want of care in others.

I say, then, that the proposal to make the master liable to a servant for the negligence of a fellow-servant is contrary to principle, unjust, unreasonable, and calculated to produce, if not no good, at least more harm than good. It would be better to make servants liable to their masters for the damage caused by their fellows, than to make masters liable to them as proposed.

One word as to the Government Bill. Its provisions are needless or wrong. If the master, by an act of omission, fails in his duty to a servant, he is liable, whether the failure was in himself personally, in his



manager, or other agent. If the injury arises from an act of commission, then the reasoning I have used is applicable. Let the actual wrongdoer be responsible. No servant is bound to obey a command attended with danger.

One word more. It is proposed to guard the master by provisions that he shall not be liable if the servant contributed to the injury. There are other qualifications. In vain. The untruths told in accident cases are prodigious. They will be told in such as the Bill will give rise to. I foresee a frightful crop of litigation if it passes. G. BRAMWELL.

*Report of the Committee of the Faculty of Advocates on "A Bill to amend the Law in respect to Employers' Liability for Injuries to their Workmen."*—The Committee met to consider this Bill immediately after being named, and after discussing its provisions would have been prepared to report thereon to the Faculty, had it not been that another edition of the Bill, "as amended in Committee," was printed and issued by order of the House of Commons.

The Committee have had the Amended Bill under consideration at various meetings. Its provisions are less objectional than those of the original Bill, but they are still open to certain objections, which the Committee are of opinion ought to be removed before the Bill passes into law.

The Committee beg therefore to report upon the Amended Bill as follows:—

SECTION 1, Sub-Section 2.—The words "or fault" should be introduced after the word "negligence," or the word "fault" substituted for "negligence." The former is more comprehensive than the latter; and there are many causes of injury against which workmen should be protected which could scarcely be classed in Scotland under "negligence."

Sub-Section 3.—The Committee, with one exception, are of opinion that this sub-section should be deleted; its terms are too broad, and would comprehend cases in which no liability should attach to the employer.

Sub-Section 4.—To prevent ambiguity or doubt, it is suggested that the clause should run "the legal personal representatives of the workman," and in Scotland "*only the person* entitled to." The words in italics are proposed to be substituted for the word "any."

SECTION 2, Sub-Section 3.—The word "fault" should be substituted for "negligence," or added as an alternative.

Sub-Section 4.—The Committee suggest that the words "some person superior to himself in the service of the employer" should be deleted. These words are too comprehensive, and might introduce a liability beyond that which the Bill really intends to impose. In place of them, the Committee suggest the words "some person who has superintendence intrusted to him;" words which are elsewhere used in the Bill, and have a definite meaning placed upon them by the interpretation clause.

SECTION 3.—The Committee are of opinion that the Bill should place no limitation on the amount of damages to be recovered in any case. Such damages will, and ought, to vary according to the particular circumstances of each case, and in many cases the limitation proposed by the Bill would be plainly unjust. The Committee are therefore of opinion that this clause should be deleted from the Bill; the amount of damage in each case being left to the determination of the Court before which the case is tried.

SECTION 4.—The Committee think the provision as to notice of an intended claim unnecessary. It may frequently be impossible within six weeks of an accident to tell what the claim may ultimately be, whether *e.g.* for injury, or for death resulting from injury. The Committee therefore think that the words “unless notice that such action will be brought is given within six weeks and” should be deleted. The Committee, on the other hand, approve of the provision limiting the time within which the action should be brought.

SECTION 5.—The first three paragraphs of this section are obviously intended to apply to England and Ireland only. This appears from the note on the margin of the Bill; but the Committee think that it should be made plain, by words inserted in the section itself, that they do not apply to Scotland. The provision by which the amount of damages is to be fixed by assessors is a novelty in Scotland, and one which it is thought undesirable to introduce. In this view the first portion of the fourth paragraph will fall to be deleted as unnecessary.

The fifth and sixth paragraphs deal with procedure in Scotland. The Committee think that parties should be allowed, as at present, to bring their actions either in the Court of Session or the Sheriff Court, subject to any right of appeal now competent. If this view is taken the fifth paragraph may be deleted altogether as unnecessary. If, on the other hand, parties are to be compelled in all cases to commence proceedings in the Sheriff Court, the Committee think the fifth paragraph should run thus: “In Scotland every action by a workman for recovery of compensation under this Act shall be brought in the Sheriff Court, but either party to the action shall have the same right of removal or appeal to a superior Court which is now competent to parties to ordinary actions.” The Committee think that the proposals in the Bill as to payment of expenses and finding caution, as conditions of obtaining review by appeal, are retrograde in character, having been now abolished in all other cases; and that the reference to section 74 of the Act of 1868, which applies solely to removal of an action in the Sheriff Court to the Court of Session, because of its contingency to another action depending there, is inappropriately introduced in this paragraph. The sixth paragraph is also a novelty in practice, and the Committee see no reason for giving the power which it confers.

A minority of the Committee are of opinion that the Bill altogether is of a retrograde character. The law has of late years been advancing towards the rule that fault shall impose an obligation for redress on the authors of the fault alone, and that rule is regarded by the minority as a sounder rule than that now sought to be introduced. But the Committee were of opinion that it would have been better, if practicable, to have protected workmen from the results of injury sustained in the course of their employment by a system of insurance, to which both workmen and employers should be bound to contribute, than by a legislative measure like the present Bill.

The Bill makes no provision against the employers contracting with their workmen that they shall not be liable for damage sustained by the workmen through the fault of fellow-servants, of whatever grade, and the Committee do not suggest that any such restriction should be imposed on freedom of contract. But no doubt employers will take advantage of this to protect themselves; and it is in view of this that the Committee would urge the consideration of an insurance system.

*Two Laws.*—Several days ago a white man was arraigned before a coloured justice down the country on charges of killing a man and stealing a mule.

"Wall," said the justice, "de facks in dis case shall be weighed with carefulness, an' ef I hangs yer taint no fault of mine."

"Judge, you have no jurisdiction only to examine me."

"Dat sorter work 'longs to de raigular justice, but yer see I'se been put on as a special. A special hez de right ter make a mouf at S'preme Court ef he chuses ter."

"Do the best for me you can, judge."

"Dat's what I'se gwine ter do. I'se got two kinds ob law in dis court, de Arkansaw an' de Texas law. I generally gins a man de right to choose fur his sef. Now what law does yer want, de Texas or de Arkansaw?"

"I believe I'll take the Arkansas."

"Well, in dat case I'll dismiss yer fur stealin' de mule——"

"Thank you, judge."

"An' hang yer fur killin' de man——"

"I believe, judge, that I'll take the Texas."

"Wall, in dat case I'll dismiss yer fur killin' de man——"

"You have a good heart, judge."

"An' hang yer fer stealin' de mule. I'll jis take de 'casion heah ter remark dat de only difference 'tween de two laws iz in de way yer state de case."

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## VACATION ARRANGEMENTS.

THE LORD ORDINARY ON THE BILLS will sit in Court on WEDNESDAY, 25th August, and WEDNESDAY, 22nd September, for the disposal of motions and other business falling under sec. 93 of the "Court of Session Act, 1868. The rolls will be taken up on MONDAY the 23rd August, and MONDAY, 20th September, between eleven and twelve o'clock.

The following is the Bill-Chamber roster for the ensuing vacation :—

Monday, July 26, to Saturday, Aug. 7—Lord LEE.

„ Aug. 9, to „ Aug. 21 „ GIFFORD.

„ Aug. 23, to „ Sept. 4 „ SHAND.

„ Sept. 6, to „ Sept. 18 „ RUTHERFURD CLARK.

„ Sept. 20, to „ Oct. 2 „ CURRIEHILL.

„ Oct. 4, to meeting of Court „ LEE.

THURSDAY, 19th August, and THURSDAY, 16th September, will be the box-days in the long vacation.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF LANARKSHIRE.—GLASGOW.

Sheriffs CLARK and LEES.

THE POLICE COMMISSIONERS OF THE BURGH OF GOVAN v. GOW AND STOBO.

*Assessments—General Police Act, 1862—Lands Valuation Act, 1854.*—The Commissioners of the burgh of Govan having imposed certain assessments under the General Police and Public Health Acts, the defenders, who were the owners of some of the subjects on which the assessments were laid, refused to pay on the ground that the occupants should have been assessed also; that possibly the tenants might have been relieved from payment of part of the taxes on the score of poverty; that the assessments were laid on for the whole year, and the subjects had not been fully occupied for the year; that no allowance was made for the trouble of collection and the risk of non-payment; that some of the tenants had left the property; and that the assessments were laid on in slump, and did not detail the amount applicable to each tenant. The Sheriff-Substitute, after proof, repelled the defenders' pleas in a judgment to which he annexed a note, of which the following are the material parts :—

“*Note.*—The pursuers of this case are the Commissioners of Police of the burgh of Govan, which was constituted as a burgh in terms of the provisions of the Police and Improvement (Scotland) Act of 1862; and in virtue of the powers conferred by that statute and by the Public Health Act of 1867 they have imposed certain assessments which the defenders decline to pay. The sum at stake is small, but at the request of the agents for the parties, as they

stated that the present action had been brought as a test case in regard to the validity of these assessments, I transferred the case from the small debt to the ordinary roll.

“By the 84th section of the Police Act above mentioned it is provided that once in each year the Commissioners ‘shall assess all occupiers of lands or premises within the burgh according to the valuation roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereafter provided in the sums necessary,’ etc. These words refer me back to the current Valuation of Lands Act, namely, that passed in the year 1854. By the 1st section of that statute it is provided that the Commissioners ‘shall annually cause to be made up a valuation roll showing the yearly rent or value for the time of the whole lands and heritages within such county or burgh, . . . and specifying in each case the nature of such lands and heritages, and the names and designations of the proprietors or reputed proprietors, and, where there are tenants and occupiers, of the tenants and of the occupiers thereof respectively.’ The 2nd section declares that it shall be in the power of the Commissioners, ‘if they think fit, not to insert in any valuation roll under this Act the names or designations of the tenants or occupiers of any lands and heritages separately let for a shorter period than one year or at a rent not amounting to £4 per annum.’ And as regards the latter class of tenants it is provided by the 31st section that where their names are not inserted in the valuation roll the proprietor shall be charged with the assessments, but have a right of relief against the tenants and occupiers. This provision in regard to the recovery of assessments imposed on premises let for less than £4 per annum is further extended, so far as regards police assessments, by the terms of the 87th section of the Act of 1862, which declares that the Commissioners shall assess the owners in place of such occupiers; but that the owners are to get a deduction equal to one-fourth of the amount of the assessment. Now the effect of this is, that as regards such tenants the police assessment is to be recovered from the owners whether or not the Commissioners under the Lands Valuation Act have or have not thought fit to specify the names of the tenants in the valuation roll. But as regards the case of leases for less than a year no analogous provision has been made, and the result therefore is that the Police Commissioners, having to depend for their assessment roll on the terms of the roll made up by the Commissioners under the Lands Valuation Act, are excluded from the knowledge of the names of tenants for less than a year if the Commissioners under the latter Act have thought fit to withhold their names. Dealing, I presume, with this contingency, the 89th section of the Police Act provides that though assessments are to be levied from occupants, yet, in the case I have been mentioning, ‘owners who shall let for rent or hire lands or premises for less than a year shall themselves as well as the occupiers be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the Commissioners shall judge expedient.’

“In the present case the pursuers have assessed the defenders as owners of premises let for less than a year for the assessments applicable to these premises. And the defenders maintain on various grounds that these assessments have not been validly imposed. They maintain, in the first place, that the assessment should be laid upon the occupants as well as on them. I am of opinion that this contention is not sound, and that as the Commissioners are authorized to recover the tax ‘from such owners or from such occupiers as’ they ‘shall judge expedient,’ they are entitled to lay the assessment on the defenders alone. It is urged, in the second place, that as the pursuers are authorized by the 88th section of the Police Act to grant relief in whole or in part to any person on the ground of poverty, it is inequitable to assess them (the defenders) for the whole of the assessment, seeing that the possible poverty of some of their tenants might have obtained exemption from the pursuers; and if such tenants were unable to pay the pursuers, they will be unable to



recoup the defenders for the assessment paid in reality for them. I am unable to sustain this plea. It is not in my power to go beyond the terms of the Act, and these are in my opinion sufficiently explicit. And I would point to this fact that the defenders select their own tenants, but the pursuers have no option as to the class of tenants who may be selected. It is further urged that the assessment objected to is laid on for the entire year, and not for the term of the defenders' occupancy. But as I read the Act, the Commissioners have no power to impose an assessment except for a year, although under the terms which I have quoted from the 89th section they may remit the assessment applicable to the part of the year during which the premises have not been occupied. More than that, their roll is but a transcript of the valuation roll; and the valuation roll is, in the words of the statute, a 'roll showing the yearly rent or value for the time,' etc. The defenders also maintain that the assessment is objectionable in respect it makes no allowance for their trouble in collecting it. It is obvious that the pursuers can grant no allowance unless the statute authorizes it, and in regard to the premises let for less than a year no such allowance is sanctioned by the Act. A concession of this nature is only made as regards tenants whose rent is less than £4 in the year; and the reason, I presume, for the concession being made as regards these assessments is that the owners who have to pay them may through the poverty of the tenants fail to recover them. Another argument used for the defenders is that as some of the tenants whose assessment they are asked to pay have now left the premises, they (the defenders) will have no means of recovering such assessment from them. That may be so, but as the assessment is laid on during the currency of the year when the tenants are in occupancy, the owners must just take what precautions they find expedient (and there are obviously simple precautions) for their own protection. The last, and as I think the strongest, ground of objection stated by the defenders is that as the amount of the assessment applicable to premises let for less than a year is levied from them in a lump sum, and without specification of the names of the tenants whose occupancy is the cause of such assessment, they are not enabled to work out their relief against these tenants. But on examination any basis this objection may have disappears. The entries in the assessment roll are, as I have said, merely a transcript of those in the valuation roll; and these again of the details furnished by the defenders themselves to the assessor in the return No. 10 of process. Now that return is made by the defenders; it enumerates all the tenants at the premises in question, 99 Blackburn Street, and it specifies the periods of their tenancy. All the tenants save five are tenants by the year. These five are entered by the pursuers as tenants for less than a year at the *cumulo* rent of £35. But the defenders under the return made by them detail the exact figures which go to make up this *cumulo* rent, and accordingly their return specifies the rent which each of these five tenants pays. Now the assessment notice tells them what the scale of taxation is, namely, 1s. 0½d. in the £; and both assessments are in this instance recoverable under the same provisions. The defenders are therefore in possession of every detail necessary to enable them both to ask for repayment of the tax applicable to each of these five tenants, and to apply to the Commissioners for repayment of any part of the assessment which has been paid for a tenant who did not occupy for a full year. The tenants also were similarly able, and in law entitled, to apply for relief from the assessment applicable to each of them if they could show they were too poor to pay it. In this way there is no necessary hardship in the defenders' position; and the course taken by the pursuers was in my opinion quite competent. In the last place, I would only advert to one fact, namely, that in the above-mentioned return made by the defenders to the assessor they enter themselves as occupants of the very five subjects in regard to which this question has arisen; and the tax is, in terms of the statute, laid upon occupants.

J. M'L."

The defenders appealed to the Sheriff, who adhered to the Sheriff-Substitute's interlocutor in the following judgment and note:—

*"Glasgow, 23rd June 1880.—*Having heard parties' procurators upon the appeal and considered the cause, For the reasons assigned by the Sheriff-Substitute, adheres to the judgment appealed against and decerns.

*"F. W. CLARK.*

*"Note.—*The points of this case appear to me to be capable of presenting themselves in very narrow compass. By the General Police Act, sec. 84, the Police Commissioners are directed to assess in accordance with the valuation roll. These Commissioners have nothing to do with the formation of that roll. On the contrary, the valuation roll is made up by the Commissioners of Supply from information given by persons in the position of the defenders themselves. In the present case the valuation roll, in so far as the defenders were concerned, does not bear the names of the occupiers, because in virtue of the powers given them to that effect the Commissioners of Supply thought fit to make up the entries in a different manner. This no doubt occasions a difficulty to arise when the Police Commissioners come to assess in accordance with the valuation roll, the only mode in which they can proceed. But this difficulty is I think removed by the provisions of sec. 89 of the Police Act, which appear to me to have been specially framed with the view of meeting a case of this kind.

*F. W. C."*

*Act.—Nicolson, MacWilliam, & MacGowan.—Alt.—Borland & King.*

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Sheriff GUTHRIE.

MAIN v. PRUDENTIAL ASSURANCE COMPANY AND THE CITY OF GLASGOW FRIENDLY SOCIETY.

*Friendly Societies Act, 1875—Contract of insurance—Transfer.—*The facts of the case are fully set forth in the following interlocutor:—

*"The pursuer is the wife of Robert Main, a soldier, who died at Aldershot on the 1st of February last. She claims £7, 10s. as the amount of insurance due to her, either by the Prudential Assurance Company or the City of Glasgow Friendly Society, both of which are called as defenders. In January last there was a subsisting insurance effected some years before with the Prudential Company by John Main, shoemaker, Stirling, father of the deceased Robert Main, on the lives of himself, his son Robert, and two other members of his family. The Prudential Company admits its liability to pay under this contract, and disclaims all objections, except the objection that the insurance was transferred to the other defending company in the circumstances disclosed by the evidence. On the 26th of January James Rae, who was employed in canvassing in Stirling for the City of Glasgow Friendly Society, called for John Main, whom he did not previously know, and pressed him very urgently to transfer his insurance from the Prudential Society to the City of Glasgow, assuring him, *inter alia*, that if he did so and paid the money he would be in immediate benefit, *i.e.* entitled at once to participate in the advantages offered by such societies in the event of death or sickness. Main and his wife did not, as they say, agree to this proposal, but, in order to get rid of Rae's importunity, they told him to call again in eight days, and that they would think about it till then. Rae, however, returned the same evening, accompanied by Andrew Macfarlane, the society's collector in Stirling. A similar process of persuasion and pressure was again applied, with the result that Main paid them 8d., being the first weekly contribution under the proposed new policy (with, apparently, 1d. for the contribution-book and 1d. for a copy of the rules), and received a contribution-book bearing the names and ages of the insured and the amounts of premium and insurance money, and also this note—'Transferred from Prudential Assurance Company to the membership of the City of Glasgow Friendly Society—in immediate benefit.' It also*

bore the collector Macfarlane's signature and address, and in the payment column, under the date 26th January, the payment of 8d., initialled by Rae. On 2d February a further payment of 6d. was made and initialled by Macfarlane, being presumably the weekly contribution for the four persons insured. It was suggested in argument that 2d. was deducted on that occasion on account of Robert Main's death; but reference to the statement of 'pay per week' in the contribution-book shows that 6d. a week was the amount payable upon the four insurances, so that there must be some other way of accounting for the '8d.' paid on January 26. There is also produced by the City of Glasgow Assurance Co. a declaration as to the ages and health of the insured, bearing the signature 'John Main.' But it appeared in evidence that John Main cannot write, and Macfarlane admitted that this signature was written by his own daughter in his own house, and not in the presence of Main, though he stated that he had Main's authority for getting it done. It is clear enough that Macfarlane had recourse to this very irregular and improper proceeding in order to comply with the third of the society's rules, which requires a declaration to be taken from persons intending to be insured whether the insurance is original or transferred. This declaration also bears the note — 'Transferred from Prudential. In full benefit on 26/1/80.' Now, upon this state of the facts the City of Glasgow Friendly Society contends that their agent had no authority to admit members, and that such admission could take place in terms of the rules (Rules II. and III.), and under the 'Friendly Societies Act, 1875,' only by delivery of a copy of the rules and of a printed policy. This society further contends that by sub-section 3 of section 30 of the statute no transfer of an insurance with one society to another can be effected without the written consent of the person insured, and without notice given by the one society to the other of the application for transfer. I need not consider this last point, for the only evidence is to the effect that Macfarlane on 26th January sent the required notice to the head office of the Prudential Society in London. The first point really in issue is whether the City of Glasgow Society is entitled to plead against the pursuer, Mrs. Main, that there is no contract of insurance with them, because (1) neither John Main nor her husband consented in writing to the transfer; and because (2) there was no policy of insurance signed and delivered in the regular way. I take the latter point first, and I observe that insurance is classed among consensual contracts. It is true that the Act requires a policy to be given; but it does not declare that without a policy no contract shall be enforced. It may well be that in the absence of a policy it shall be incompetent to prove a contract of insurance by mere parole proof of consent. But I take it to be settled that the acts of parties may, if the terms of the bargain be otherwise clearly instructed, be such as to create an obligation to deliver a policy; as, for example, if a society were to go on receiving premiums upon a contribution-book for a series of years. In such a case it would be gross injustice to allow the contract to be repudiated because of the want of a policy. In this case the contribution-book with sufficient clearness shows in the handwriting of the society's agent what the terms of the contract were; and it shows also that two weekly payments were made to the society's agent, the amount of which, it must be presumed, in the absence of either averment or proof to the contrary, has found its way into the society's coffers. The amount of these payments is small, but if it be possible for a contract of insurance to be constituted by consent proved by informal writing, followed by *rei interventus*, consisting of payment of premiums, it does not appear to be reasonable or possible to distinguish between different cases according as these payments are few or many, large or small. Probably no one would think it hard or unreasonable to hold the society bound if it had gone on getting weekly premiums through its agent for a year. On what principle, then, can I hold it not to be bound when it has got such payments for a fortnight? It is said that the collector and the canvassing agent, through whom John Main was induced to go into this contract, were not authorized to conclude a contract of

insurance, which could only be done by the delivery of a policy of insurance duly signed by the directors of the society. It is quite true that the agent could not sign a policy of insurance or other contract binding the society. But agents and canvassers are employed by such societies as this for the purpose of securing members. It is within the limits of their authority to solicit strangers to become members, and to receive payments from members and intending members; and it is a well-known rule of law that a principal cannot take benefit by a contract induced by the misrepresentations or fraud of his agent and at the same time repudiate the obligations which it imposes. Here it appears that the City of Glasgow Society has taken benefit by the amount of the premiums paid by John Main; these premiums would not have been obtained but for the misrepresentation or misstatement that he would be in immediate benefit made by Rae and Macfarlane in the course of their employment; and I am therefore unable to arrive at any other result than that the society is bound by the contract made with them. I have only to add that, according to the evidence, Macfarlane and Rae did not deliver to John Main a copy of the rules of the society, as required by the 30th section of the Act, sub-section 1. If they had done so, it might have been argued that he was able and was bound to see that he could not be in immediate benefit until certain forms were complied with. As the matter stood, he relied on the society's agents for information as to its benefits and the conditions on which they could be obtained. The other point raised by the defender is that Main's written assent to the transfer is wanting. It seems to me, however, that this requirement of the statute is plainly intended for the protection of insured persons against transfers to societies of doubtful standing, and possibly of insuring companies against unscrupulous canvassers for rival societies. I think, therefore, that it is not pleadable by the society to which a transfer is attempted, in order to save it from liabilities solicited and incurred through its own agents. In the present case, it may be conjectured that the fabrication of John Main's signature to the declaration may have been partly intended to afford written evidence of his assent to the transfer. But I am not disposed to take that declaration and signature into account in judging of this point in the case. Decree against the City of Glasgow Friendly Society as libelled, with 27s. 1d. of costs."

*Act.*—M'Lachlan.—*Alt.*—Bell & Paterson.—*Alt.*—Gordon Smith & Lucas.

## SHERIFF COURT OF KILMARNOCK.

Sheriffs CAMPBELL and COOPER.

RANKIN AND SON *v.* HOWIE.

*Bills granted by a ship's-husband—Effect of renewals—Responsibility of agents.*  
—The circumstances of the case are fully disclosed by the interlocutors and notes which follow:—

"*Kilmarnock, 22nd October 1879.*—The Sheriff-Substitute having heard parties' procurators upon the closed record, Finds that the defender is liable to the pursuers in the sum of £80; therefore repels the defences, and decerns against the defender for the sum of £80 sterling, with expenses, whereof allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report. W. S. COOPER.

"*Note.*—This is an action by William Rankin & Son, grocers and dealers in stores, in Troon and Kilmarnock, against John Howie, coalmaster and ship-owner, Hurlford, recently part-owner of the vessels Annie, Charles, and C.

F. Eaton. In the years 1875 and 1876 another part-owner, Hugh Watt, who was also ship's-husband of the above vessels, ordered from the pursuers certain stores and furnishings for these ships to the total amount of £243, 2s. 8d. From this sum the pursuers made a reduction of £3, 2s. 8d.; and for the balance of £240 they drew a bill at three months upon Hugh Watt, as managing owner of the three vessels, which was accepted by the said Hugh Watt 'for self and other owners.' The date of this bill was 11th April 1876. Upon 13th July following Watt paid £60 to account, and granted a bill for the balance of £180 'for self and owners.' This bill, when due, was given up on a payment of £80 in cash and a new bill for the balance. On this last bill becoming due, a payment of £20 was made, and another bill for £80 was drawn upon Hugh Watt 'for self and owners,' and accepted by him 'for self and other owners,' the date being 22nd November 1876. This bill was renewed for the same amount upon 29th January 1877. The pursuers ask for judgment on either of these two £80 bills. The defender, in the first place, argues that Watt had no authority to grant bills. This position, however, is untenable. It is admitted that Watt was ship's-husband, and it is quite clear that, although the powers of a ship's-husband do not extend to the borrowing of money, yet he may grant bills for furnishings, stores, etc., which will bind the owners, although he may have received money wherewith to purchase them (Bell's Principles, sec. 449, p. 196; and Bell's Commentaries, seventh edition, p. 553). The defender then says, 'Even if Watt had authority to grant bills, he had no power to renew them, and that the renewals were in reality giving time, and that the other parties ought to be discharged.' It is to be observed that the original bill of £240 was never given up by the pursuers; it is still in their possession; and it must be held that these bills which were taken from the acceptor were merely collateral securities, as there is nothing to show they were intended to supersede the first bill (Thomson on Bills, p. 391). The principal contention of the defender, however, is that in the whole circumstances of the case, and looking particularly to the state of accounts between Watt and himself, it would operate injustice if the pursuers were to succeed. It appears from the defender's statements that Watt had received money wherewith to pay the pursuers' accounts, and that the defender believed Watt had paid them; that in April 1877 Watt became bankrupt, and that it was only after the date of Watt's bankruptcy that the defender first heard of these bill transactions. The defender refers to the following passage in Russell on Agency, p. 68: 'And so it appears that speaking generally the right of the seller to sue the principal may be limited by the fact that the state of the accounts between the agent and the principal would make it unjust that recourse should be had against the latter.' In the cases referred to, viz. *Smyth v. Anderson* (7 C. B. 21, 35, 36), *Armstrong v. Stokes* (4 R. 7, 2 B. 598, 604), and *Thomson v. Davenport* (9 B. C. pp. 86, 88), it will be found that this really refers to the case of an undisclosed principal, and where the seller had looked to the responsibility of the agent. In the case of a ship's-husband it is totally different. His principal or principals can easily be ascertained, and the seller does not look to the responsibility of the ship's-husband, so long as he is acting within his powers. In *Reid v. White* (Espanasses Report, p. 122) a jury found that in drawing a bill upon the ship's-husband alone the plaintiff adopted him as the debtor; but a more reliable judgment will be obtained from *Robinson v. Read* (Barnewall & Cresswell's Reports, K. B. 1829, p. 449)—a case very similar to this—where a tradesman took the ship's-husband's acceptance at three months, deducting discount; and when the bill became due consented to a renewal and in like manner took a third acceptance, which was dishonoured, and the ship's-husband soon after failed, the balance in his hands in favour of his principal (the ship-owner) having all along exceeded the amount of the bill; it was held that the claim was not discharged by the acceptance of the agent. In the present case the Sheriff-Substitute is satisfied that although the defender has undoubtedly been unfortunate, yet that the pursuers have in no way contributed to his



misfortunes. The pursuers have obtained no advantage by the course of dealing in question, and the defender has sustained no prejudice. A point has been raised in regard to the last renewed bill of £80. On the one hand it is said that prior to its date (29th January 1877) Watt had ceased to act as ship's-husband. On the other hand it is alleged that Watt delegated his authority, and that he had no power to do so. The Sheriff-Substitute does not think it necessary to go into this matter, as it is not disputed that the pursuers can competently sue upon the prior bill of £80 (dated 22nd November 1876), which is not open to such objections; and it is upon this bill that judgment is given. In conclusion, as it is not averred by the defender that either of the two £80 bills have been paid, it is unnecessary to make reference to the pursuers' oath, and in the whole circumstances the Sheriff-Substitute does not think that the pursuers are entitled to interest.

W. S. C."

"*Kilmarnock*, 21st January 1880.—The Sheriff having considered the appeal for the defender with his reclaiming petition, and the answers thereto, and whole process, before answer appoints the defender to lodge within eight days from the date hereof an articulate specification of the writs and documents by which he proposes to instruct payment or discharge of the sum sued for, or that the bill or bills for £80 were for the accommodation of Watt: And further, within the period above mentioned, appoints the pursuers to produce, in so far as in their possession, the remaining bills referred to on record.

"N. C. CAMPBELL.

"*Notes*.—It is admitted on record that the defender along with Hugh Watt was an owner of the three vessels mentioned on record; that Watt was ship's-husband of these vessels up to the 7th of January 1877 at least; that in discharge of his duty as ship's-husband he ordered and received from the pursuers supplies of stores, provisions, etc., for the vessels, conform to accounts Nos. 1, 2, and 3 of process, to the *cumulo* amount of £243, 2s. 8d.

"So far there is no dispute, and the effect of this was, beyond all doubt, that the owners became indebted to the pursuers in the sum of £243, 2s. 8d.

"Further, it is admitted that for this sum, under deduction of £3, 2s. 8d., Watt as managing owner or ship's-husband (which are synonymous terms) accepted the bill drawn upon him by the pursuers for the *cumulo* amount of the accounts. The bill is produced by the pursuers, and is dated 11th April 1876. These facts being admitted the question is raised by the defender whether the granting of this bill was within Watt's power as ship's-husband. To this question no other answer can be given than that which Mr. Bell has given in his Principles, sec. 449 (last edition), viz. 'He may grant bills for furnishings, stores, repairs, and the necessary engagements which will bind the owners even though he may have received money wherewith to pay them.' Here then we have, in the first place, an account for which the defender was undoubtedly liable, and second, a bill granted in 1876 for the amount of that account, which bill is binding on the defender just as much as if it bore his own signature. This disposes of the defender's plea of prescription. By payments which are admitted the debt has been reduced to £80, the sum sued for; and for this sum the pursuers hold a bill by the ship's-husband. Now what are the defences other than prescription against payment? They are pretty well summarized in the reclaiming petition as follows: (1st) That the accounts (of which the bill represents the balance) were paid; (2nd) that the pursuers in taking renewal bills accepted Watt as their debtor; and (3rd) that the last-mentioned bill, viz. the bill for £80, was granted for Watt's accommodation, and that the pursuers, or those for whom they are responsible, were cognizant thereof. As to the second of these grounds of defence the Sheriff is of opinion that the mere taking of renewal bills by the pursuer, on receiving partial payments, did not discharge the debt, or disable the pursuers from recovering from the defender. As to the other two grounds of defence the Sheriff gives no opinion

at present. In regard to the averments of payment (which are contained in the fifth and sixth articles of the revised defences) they are far from distinct. If the defender saw the accounts and examined them and passed them, as he seems to say he did, he should be able to state very specifically whether they were discharged or no. From his statement on record, however, it would appear that they are not now in his possession. It is not unreasonable, therefore, that a diligence should be granted him, if he desires it, *and if he specify distinctly and articulately the documents or writs by which he means to instruct payment or discharge*, or even that the bill for £80 was granted for the personal accommodation of Watt; bearing in mind that Watt was ship's-husband when he granted the bill dated 22nd November 1876, and that it is not said that the pursuers received any intimation that he had ceased to be ship's-husband when he granted the bill for £80, dated 29th January 1877. In the meantime a specification has been ordered, but *before answer*. N. C. C."

"*Kilmarnock, 14th July 1880.*—The Sheriff having resumed consideration of the cause, with the report of the diligence granted to the defender, Recalls the interlocutor of 22nd October 1879: Finds in point of fact that the defender along with Hugh Watt was in October 1875 owner of the three vessels mentioned on record; that the said Hugh Watt was ship's-husband of these vessels from that time up at least to the 7th of January 1877; that in discharge of his duty as ship's-husband he ordered and received from the pursuers supplies of stores, provisions, etc., for the said vessels, conform to accounts Nos. 1, 2, and 3 of process, amounting to the *cumulo* sum of £243, 2s. 8d.; that under deduction of £3, 2s. 8d., the said Hugh Watt as ship's-husband accepted the bill drawn upon him by the pursuers for the said *cumulo* sum (No. 4 of process); that this debt has been reduced by payments to the pursuers to the sum of £80; for which sum the pursuers hold a renewal bill (No. 22 of process) accepted by the said Hugh Watt as ship's-husband aforesaid; that although allowed a diligence to recover the necessary writs, the defender has failed to establish his averments that the sum sued for has been paid, or that the said bill for £80 was for the personal accommodation of the said Hugh Watt: Repels the objections for the defender to the rulings of the Sheriff-Substitute in executing the diligence: Finds in point of law that the defender is liable to the pursuers in the said sum of £80, with interest thereon at the rate of five per cent. from the date of citation, and decerns accordingly: Finds the defender liable to the pursuers in the expenses of process, and allows the fee of £5 to be charged for the debate before the Sheriff-Substitute, on the ground stated by him: Farther, allows the pursuers to give in an account of expenses, and remits the same when lodged to the Auditor of Court to tax and report; and lastly, remits the cause to the Sheriff-Substitute that the expenses may be decerned for. N. C. CAMPBELL.

"*Note.*—The above interlocutor is practically an affirmance of the judgment of the Sheriff-Substitute, and the grounds of the judgment in point of law are so fully explained by the Sheriff-Substitute in his interlocutory note, and in the Sheriff's note to the interlocutor of the 21st January last, that further remark is unnecessary. N. C. C."

*Act.*—J. & J. Sturrock—*Alt.*—J. P. Stevenson.

## PERTH SMALL DEBT COURT.

Sheriff BARCLAY.

GEORGE LOGAN v. THE COUPAR-ANGUS SCHOOL BOARD.

*Fixtures—Bells.*

"*Perth, 11th June 1880.*—The defenders plead a counter-claim of £3, 7s. 6d. against £7, 7s. 6d., a balance of salary as schoolmaster. The counter-claim was founded on the fact that the pursuer, contrary to warning, took away the bells from the schoolmaster's house when he left, and which the Board had to replace at the cost above mentioned.

"The question is whether the bells were fixtures attached to the house or movable, and were the pursuer's property, as placed by him or his predecessor in the house. The facts are—

"(1st.) There is no evidence who placed the bells in the house. The house was erected and the pursuer elected before the Act 1872.

"(2nd.) The bells were included in an inventory of articles (but not *separately* valued) as being the property of the predecessor of the pursuer. It is not completely established that the pursuer paid the sum of the valuation of the inventory including the bells.

"(3rd.) The pursuer removed the bells on his leaving the house, claiming them as his property.

"The law of fixtures arises in different aspects and is often not very absolute or defined. The Sheriff-Substitute refers to his notes in the *Murthly* case appended to the 'Rule of the Law of Fixtures,' by Archibald Brown, Barrister-at-Law. Second edition. 1872.

"The present dispute falls under the relation of landlord and tenant. The bells are not of the nature of *trade* articles, which are always more favourably viewed for the tenant than in other circumstances. Some principles of law in reference to fixtures have been well established both in England and Scotland.

"(1st.) Lord Romily observed, 'The question is not whether the article itself is easily removable, but whether it is *essentially* a part of the building itself from which it is proposed to remove it' (Brown, p. 15).

"(2nd.) To the same import the Lord Chancellor of Ireland remarked 'that the *possibility* of removal is not so much the test as the *nature of the article*' (Brown, p. 106).

"(3rd.) 'Articles merely *ornamental*, however, fixed by the tenant appear removable, but such as have an *affinity* for the house to which they are annexed instantly unite in an *indissoluble* manner with the house. They are let in the house, and the house in consequence becomes a better, because a more perfect house' (Brown, p. 11).

"(4th.) In an English case it was decided that 'keys, though they are distinct things, pass with the house' (Brown, p. 143).

"(5th.) Lord Tenterden in 1830 'held that bells hung by a *yearly* tenant at the *sole* expense of the tenant himself, but allowed by him to remain fixed to the freeholder after the expiration of the term, became the property of the landlord, and not even when afterwards severed by the landlord resume the character of chattels, so as that the tenant might bring trover (recovery) for them' (Brown, p. 84).

"(6th.) In *Weston v. Weston*, decided in 1869, 'it was held that a bell hung upon a frame and fastened to it by a hasp, the frame being nailed to the cupola of a barn, was a fixture, and passed by a conveyance of the estate, the bells having been used in connection with the barn for ten years' (Brown, p. 147). (These two last decisions are the only cases of bells that appear in the books.)

"Adopting these legal maxims—

"1. In the absence of proof who placed the bells in the house, the presump-

tion is that the heritors did so. They were bound by statute to give the parochial schoolmaster a dwelling-house. A house with several apartments is almost universally provided with bells, which are not of the nature of ornament, but essential to the use and comfort of the dwellers in the house. There is room for a distinction between bell-pulls and the bells with their wires. The pulls are often ornamental and valuable and easily detached from the bells, and therefore may be held as movable.

"2. It is proved that the bells were attached to the walls with spikes driven in. Two skilled tradesmen gave their decided opinion that the bells were fixtures. The bellhanger who placed them at the cost of the sum in the counter-claim did not attach the new set to the wall with spikes, but with springs attached to a frame by screw nails, and even with that difference he still considered that the bells were fixtures.

"3. The pursuer, on the defenders refusing to buy the bells, removed them, and some of the wall-plaster was fractured. He has not replaced them in any house, but has them still in his possession in Edinburgh. If not replaced in some suitable house they will be only worth the price of metal.

"4. When the defenders refused to pay him for the bells, he ought to have left them and sued them for the value, if he considered them his property. In all these circumstances the counter-account must be allowed.

"HUGH BARCLAY."

*Act.—Mitchell.—Alt.—M'Kay.*

## NAIRN SMALL DEBT COURT.

Sheriff SMITH.

GRANT v. CHALK AND FALCONER.—June 18, 1880.

*Wages of a domestic servant held not to be preferable to rent.*—The facts are fully disclosed in the following judgment, viz.:—

"In this case the defender Chalk was tenant of a house and shop under the other defender Falconer, from Whitsunday 1879 to Whitsunday 1880, and for some years previous. Chalk having got into difficulties, and being unable to pay his rent, Falconer in the course of the last half-year hypothecated and sold off the whole effects on the premises, and applied the proceeds towards payment of the rent, but they were insufficient for the purpose. Chalk has since left the premises. The pursuer, Jessie Grant, was in the service of Chalk during the year in question. She was principally engaged to assist in the shop, but she lived in the premises, and assisted in the domestic work of the family as well. Her wages, including an allowance for washing, were £7 in the half-year. She brings the present action for two half-years' wages, no part of which, she says, has been paid. Chalk admits this, and there will, therefore, be decree against him as concluded for. But she also sues Falconer on the ground that Chalk is insolvent and unable to pay her, and that Falconer, having sold off the effects in the premises in which she was employed, she is entitled to be paid preferably out of the proceeds.

"The contention on the part of the pursuer is founded on the following remarks in Mr. Fraser's work on 'The Law of Master and Servant,' vol. i. p. 126, viz.: 'It is a general rule of law that all privileged debts are preferable to the claims of hypothecary or real creditors, such as a landlord or poinder, as well as over mere personal creditors. "Privileged debts," Erskine says, "are preferred before all others," and in all the books the wages of domestic servants are stated to be privileged, ranked in the same class with funeral expenses, which unquestionably are preferred to the landlord's hypothec, and to the real right required

by pointing, and declared to be privileged from the same reasons of decency and humanity. Notwithstanding, therefore, the special grounds on which the Court gave the preference to farm servants, and which excludes domestic servants, if correct, it cannot be said that it is settled by any clear authority that domestic servants are not entitled to a preference over the landlord's hypothec.'

"The case referred to in the passage which has been quoted is the case of *M'Glashan v. the Duke of Athole*, decided in the Supreme Court on 29th June 1819, in which it was held that the wages of farm servants were preferable to the rent, because the labour of the farm servants went directly to the production of the crop out of which the rent was paid. It is admitted by the learned author himself that the grounds on which that case was so decided would exclude the preference of domestic servants in competition with the landlord's claim for rent. They would still more exclude the claim of a shop attendant. But the grounds of such a decision in a supreme court cannot be called in question by an inferior court. They are binding on me, even if I had reason to question them, which I have not. It is therefore my duty to hold that the claim of the present pursuer is not preferable to that of the landlord, and that Mr. Falconer must be assoilzied from the action in so far as it applies to him.

"The view now taken, it is believed, is in accordance with the universal practice of the country. It is well known that in the ordinary and familiar business of house-letting, the landlord is considered to be secure, if the value of the tenant's effects is sufficient to cover the rent, with a reasonable margin for <sup>Taxes</sup> wages and expenses. The diligence of hypothec for rent is unfortunately almost equally familiar, and no instance is known in which the wages of domestic servants have been held to be preferable to rent. Sheriff Barclay of Perth, who has had longer experience of the application of the law than any other local judge in Scotland, states in his 'Digest of the Law of Scotland' that the general opinion and practice are averse to such a claim. It would seriously alter the relations of landlord and tenant, more especially in regard to urban subjects, if any other view were to be entertained or acted on. Even if a change were expedient, which is very doubtful, it could only be made in such circumstances by the Legislature, and not by a court of law.

"If the pursuer were held to be a shop attendant and not a domestic servant, her case as against the landlord would be weaker than it is.

"The provisions of the 122nd section of the Bankruptcy Act of 1856 and of the Bankruptcy Amendment Act of 1875 apply only to competitions with ordinary creditors, and do not affect the present question."

*Act.—Mackenzie.—Alt.—Lamb.*

## SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

R. B. WOOD.—22nd July 1880.

*Cessio—Abandonment of action—Expenses.*—This was an action of *cessio bonorum*, in which the application for interim liberation had been opposed by a firm in Glasgow, who were the incarcerating creditors. Warrant for liberation was, however, granted upon caution. Thereafter, and before the diet for examination had taken place, the pursuer Wood moved for leave to abandon his action, when the incarcerating creditors pleaded that payment of their expenses incurred in opposing his former application be made the condition upon which such leave should be granted.

The Sheriff-Substitute granted the pursuer's motion, adding to his interlocutor the following note:—

"*Note.*—This is a somewhat unusual application. The incarcerating



creditors insist that it can only be granted upon payment to them of expenses. Now, what is the expense which has been incurred up to this time? It has related entirely to the question of interim liberation. The petitioner's liberation was opposed by the incarcerating creditors—unsuccessfully, it may be observed—and an interlocutor pronounced which is silent upon the matter of expenses. Had the action of *cessio* gone on and the petitioner been unsuccessful, no decree would have been given for such expenses as the incarcerating creditors have incurred at this date.

“The principles laid down in *Clark v. Loos* (20th January 1855, 17 D. 306) would rather seem to apply to such a case as the present. Then pending an action, a petition for recall of arrestments used in reference to it was granted without anything being said as to expenses. It was afterwards held that the party successful in the action could not recover the expenses connected with this petition.

“Why should the incarcerating creditors be placed in a better position with regard to expenses than they would have been in had decree of *cessio* been ultimately refused? Practically this is just a case in which it has been refused without the creditors having had the trouble and expense of opposing it.

“W. G. S. M.”

*Act.*—Soutar.—*Alt.*—Morison.

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# THE JOURNAL OF JURISPRUDENCE.

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## THE SCOTTISH TREASON TRIALS OF 1820.

THE year 1820, in which his Majesty King George IV. began his reign, was signalized in Scotland by a grand judicial spectacle, a novelty to that generation, and one which has fortunately never been witnessed by those which have succeeded it—nothing less than the assembling of a Court of Oyer and Terminer. These mysterious words were surely sufficient of themselves to have struck awe into the breasts of the disaffected, and had they been well advertised, by way of threat, must have effectually restored the public peace.

All our legal readers know that since the Union there has been but one law of treason for both countries. Whether the law might not have been assimilated without bringing across the Tweed all the legal machinery of England is a question, but the assimilation has in point of fact been made to extend to the form of trial. Hence a trial for treason in this country means not only the investigation of an alleged crime of great gravity, but the investigation by means of a process to which judges and counsel are almost of necessity strangers. The Lord Advocate and his satellite the Procurator-Fiscal give way to the Grand Jury. One well-known and respected official, the Sheriff of the county, becomes practically for the nonce the High Sheriff, and English rules regulate the procedure, and English oaths are heard from the mouths of Scottish macers. The trials to which we are about to direct the attention of our readers, and of which a very full report has been preserved, have therefore an interest apart altogether from the question of the guilt or innocence of the accused. As to that matter, probably many would now incline to the opinion that the treason, if treason there was, hardly warranted all the fuss which was made about it, and that the ordinary courts could have sufficiently vindicated the majesty of the law without calling in the assistance of this highest tribunal, this session of Oyer and Terminer. Cockburn, in a few characteristic sentences, has thrown ridicule upon the whole affair,

and he doubtless represents the opinion of the moderate Liberals of that day, who, while far from encouraging the seditious, saw no necessity for making mountains out of molehills. The Government of George IV., however, thought differently; and accordingly, on 29th May 1820, two Commissions, one in Latin, the other in English, sealed with the great seal of England, were issued. These were directed to the Lord Justice-General (Duke of Montrose), the Lord President, the Justice-Clerk, and Commissioners of Justiciary, and also to those useless and now extinct legal dignitaries, the Chief Baron of Exchequer and Commissioner of the Jury Court. In this particular instance, however, their acquaintance with English law was doubtless of service. These Commissioners were directed to inquire "by the oath of good and lawful men of our shires or counties of Stirling, Lanark, Dumbarton, Renfrew, and Ayr," concerning all high treasons and misprisions of high treason within these counties.

The first thing which the Commissioners did was to appoint as a clerk a certain Mr. Thomas George Knapp, described as "of Haberdashers' Hall, London, gentleman," it being obviously necessary to secure the services of some one from the south to keep the Scottish judges right in point of form. The next step was to issue precepts to the sheriffs of the different counties, directing each upon a certain day and at a certain hour to cause to come before the Commissioners twenty-four good and lawful men of your said county, to inquire, present, do, and execute all and singular those things with which they shall be there and then charged and enjoined."

The Commissioners seem to have held their first meeting at Stirling on the 23rd of June 1820, six of their number being present, and the minister having prayed, the cryer cried, the various returns being duly made, and the grand jury sworn, the Lord President proceeded with his charge. This address is interesting as the exposition by a Scottish judge to a Scottish jury of English law and procedure, exhibiting a pardonable pride in that legal system with which he was most familiar, but which had for the occasion to be discarded. Thus having explained the change brought about by the Union bringing Scotland under the treason law of England, he says, "As to the form of trial, Scotland did not gain much by this change, for we already had a most admirable form of trial: by which every prisoner accused of ordinary crimes has as great advantages as the law of England indulges to persons accused of high treason." At the same time he admits that Scotland did gain by the substitution of a new law of treason for one which was at once more severe, sanguinary, and ill-defined. He admits, further, the advantage gained to this country by the substitution of a grand jury in place of the Lord Advocate in the cases of such offences against the Crown, whose official he is. The peculiar fictions of the treason law by which the most varied acts are all construed into compassing and imagining the death of

the King are carefully explained. On the whole the charge is an excellent one, and seems to have made a deep impression upon the loyal grand jury of Stirlingshire, who requested his Lordship to permit its publication. The grand jury then retired, accompanied by the clerk and procurator-fiscal, to examine witnesses and find their true bills, which they seem to have lost no time in doing, the result being that eighteen defendants were put to the bar to answer for the great and mighty treason arising out of what was known as the *Bonnymuir* case. Counsel and agents were assigned to them. Among the counsel were Jeffrey, Murray, Cullen, and Hunter, the late Sheriff of Bute. The Court then adjourned until Saturday, 24th June, when true bills were returned against a number of other persons connected with the *St. Ninian's*, *Balfron*, and *Camelon* cases. The trial of the Bonnymuir offenders really commenced on the 6th of July, when the indictment against them was read. This seems to have been a document of prodigious length. Under the first count, that of "compassing and imagining the death of the King," there were nineteen overt acts charged. The remaining counts were those of "levying war," "compassing and intending to depose the King from the style, honour, and kingly name of the imperial crown of this realm," and "compassing to levy war against the King in order to compel him to change his measures." As was to be expected, before the actual trial began there was the usual amount of preliminary fencing engaged in by the learned gentlemen of the Bar. First Mr. Cullen presents an objection to the indictment, speaking with deference, as he says that "with the forms of procedure, the rules of evidence, and many other matters which are regulated by the law of England it cannot be expected that I should know almost anything." His objection of the regular Scottish type is one taken to the *locus* which was set forth in the indictment as "the parish of Falkirk, in the county of Stirling." He maintains that by the law of England where a parish only is mentioned in such documents it is to be presumed that this parish consists of just one *vill* or small town, whereas he is in a position to prove that in Falkirk there are several such *vills*, and the particular vill ought therefore to have been specified. He speaks with deference, but well, and is duly complimented by the Bench. He is replied to by Mr. Sergeant Hullock, an English barrister sent down to assist the Crown counsel, and to whom such duties naturally fall. The learned sergeant is almost indignant in his tone as he assures their Lordships that if the place is wrong laid in this indictment there has not been an indictment heard and tried which has not been laid as in this indictment, and no such objection was ever brought forward, except in one instance, when it was repelled. He questions the authorities quoted by his opponent. He goes further, and questions the existence of such a thing as a vill in Scotland. Of course he prevails. Indeed it is obvious that on all such points the Crown had a great advantage

in possessing an English counsel to awe the Scottish judges, who must have felt rather afraid of betraying their ignorance.

Each prisoner is then asked to plead.

*Thomas M'Culloch*—"Not guilty."

*Mr. Knapp*—"How will you be tried?"

*Thomas M'Culloch* (prompted doubtless from behind)—"By God and my country."

*Mr. Knapp*—"God send you a good deliverance."

Nothing further was done that day, but the Court resumed its sittings upon the 13th of July, when the trial of Andrew Hardie commenced. And now Mr. Jeffrey has another objection to take. The effect of Mr. Sergeant Hullock's eloquence has probably been discussed by the counsel for the defence during the interval, and a bold attempt is made to get rid of him. "My Lords," says Jeffrey, "I observe in the array of the counsel for the prosecution an individual known to me and generally known by reputation, but unknown as a practitioner in any Scottish court." He proceeds to argue that the mere fact of the law of treason being identical in the two countries could not confer upon English barristers the right to appear in Scottish courts. They might as well assert their right to take part in any suit which depended upon a statute common to both kingdoms. Mr. Hullock did not take part in this discussion, possibly from motives of delicacy, but the Court had no hesitation in deciding in favour of his retention. There was both analogy and precedents against Jeffrey's argument, and the case of the House of Lords open to English and Scottish counsel alike was in point; and at the trials of 1745 rebels, Alexander Lockhart and other Scottish advocates had appeared before the York and Carlisle commissions, while at a later date, in 1794, when Downie and Watt were tried at Edinburgh, English barristers had taken part in the proceedings. Jeffrey had still another objection, and that was founded upon the alleged incompetence of the Sheriff who returned the jury. The Scottish sheriff, he maintained, did not correspond to the official whose duty it was to make a return of the jury in England. That official was not the nominee of the Crown as was the Scottish sheriff-depute, he was appointed annually, and required different qualifications. "It is," he says, "no answer at all with submission that this return is made by a sheriff, and that that sheriff is as near the English sheriff as the institution of the office, by constitutional law and practice in Scotland, will admit." Sergeant Hullock springs to his feet—the learned sergeant must surely by this time have despaired of ever getting beyond the preliminaries with these persistent Scottish advocates. This last objection he affects to treat lightly. He has heard various since he came into this country, "but none of them entitled to so little weight or answer as that just stated." He maintained that the distinctions dwelt upon by Jeffrey between the English and Scottish sheriffs either did not exist or were immaterial, and that it was incompe-



tent to investigate the title of the sheriff-depute of the county; it was to be presumed that he had the title which he professed to have. Jeffrey returned bravely to the charge, but it was hopeless. And indeed it would have been a terrible *fiasco* if after all this trouble and expense, the English and Latin Commissions, the selection of learned judges, the engagement of a special clerk from Haberdashers' Hall, and of Sergeant Hullock, the whole business had come to an untimely end from the want of the proper sheriff. The poor Lord President observes, "According to the argument of Mr. Jeffrey, the sheriff need not obey the writ; indeed all our proceedings will go for nothing, for we have been travelling about the country doing nothing, and we cannot suppose the Legislature so stultified as to say a proceeding should go on when it had not provided the means to take the first step." The Lord Chief Baron drew an illustration from his own Court, the Exchequer. The sheriff in an Exchequer process must be understood to mean the sheriff qualified according to the law of the place where he acts.

The Lord Advocate calls the case of Andrew Hardie. Still Jeffrey has another step to take in the interests of his client. There is an old statute of William and Mary under which the jurymen must have been summoned six days before the trial, and he proposes that the clerk should ascertain if that has been done. Sergeant Hullock assures the Court that this Act has expired, and the objection which could arise under it was one only for the juror. The Scottish judges are probably puzzled, but the Lord Chief Baron comes to the rescue, confirms Hullock, and so the jury get into the box.

Then the Lord Advocate, in English fashion, opens the case for the Crown.

From the statement of counsel and the evidence led we may now give a brief narrative of the events which ended in this trial. It appears, then, that sometime during the night of Saturday the 1st of April 1820 there were posted up in the streets of Glasgow, and in other places in the neighbourhood, copies of an address to the inhabitants of Great Britain and Ireland, professing to be issued "by order of the Committee of Organization for forming a provisional Government." The address contained a declaration that the extremity of their sufferings and the contempt heaped upon their petitions for redress had reduced the framers to take up arms for redress of grievances. They claimed equality of rights, not of property. An expedition of some sort was indicated in these brave words, "Liberty or death is our motto, and we have sworn to return home in triumph or return no more." The soldiers were invited to unite with the citizens. It wound up with a piece of advice to the proprietors of public works, who were advised to shut them up until order had been restored. Early in the morning following upon the publication of the address a Lanarkshire magistrate of the name of Hardie chanced to come upon a small crowd of people

listening to one of their number who was reading this obnoxious document aloud. The magistrate made a gallant attempt to pull it down, in which he was resisted by his namesake the prisoner, who said that before he would permit him to take down that paper he would part with the last drop of his blood. The baffled magistrate had to beat a retreat, numbers being too strong for him, and was not long in finding another copy of the address pasted upon a pump-well, which, being unprotected, he had the intense satisfaction of taking to pieces. Monday seems to have found Glasgow in a state of considerable alarm, with nearly all the manufactories closed, and, to quote the words of the Lord Advocate, "the population of that great city assembled in the streets, where they formed themselves into columns and marched with the military step." Very alarming no doubt. True, it is not said that they were armed, or even that they indulged in seditious cries, or made any disturbance, but then their march with the military step, we must assume with the learned counsel, meant something dangerous. The rebels of Glasgow seem, however, to have been waiting for the country, and perhaps the country was waiting for Glasgow. To whatever cause we may attribute it, the fact remains that the result was very trifling. The mountain in labour was big enough, but the mouse produced was but a small one. The next scene in the drama, indeed, presents a descent from the sublime to the ridiculous—a little army of thirty or forty march off from Gadshill armed. Even the Lord Advocate, by no means disposed to understate his case, cannot say that this startling force, prepared to battle with all the troops, yeomanry, and militia they might encounter, were "armed with regular arms." Their leader was the prisoner Hardie, who does seem to have possessed a musket. They breakfasted at Castlecary, the bill for the breakfast of the whole army amounting to the modest sum of eight shillings. The funds even then must have been at a low ebb, for it was at first proposed to the landlord who supplied them that he should take a bill at six months. The party then formed into two divisions, one of which, under the command of the prisoner, having procured additional arms and ammunition, took the highroad towards Camelon in the parish of Falkirk. Here they met a solitary yeoman, whose arms they attempted to take, but as he declined to give them up he was allowed to go on his way, a rather stupid proceeding, as this gentleman made direct for Kilsyth, where the King's troops were stationed, and gave information. At Camelon the two parties united and made for the common of Bonnymuir. Their united force amounted to barely over thirty. In the meantime the troops at Kilsyth had received the news, a body of sixteen hussars and yeomen set off in pursuit, and royalists and rebels met on the moor. The latter took shelter behind a wall some five feet in height and fired two or three shots, wounding Lieutenant Hodgson of the 10th Hussars in the hand, and still more severely wounding his horse.

The soldiers, however, got through a gap in the wall and this decided the day. Eighteen prisoners were speedily taken. One man was left badly wounded on the field. The arms which fell into the hands of the victorious party consisted of sixteen pikes and one pike-handle and a pitchfork, five muskets or guns, and two pistols. Thus ended what Crown counsel were pleased to describe as "the battle." This was in the month of April, and when we consider that in July the Lord Advocate was able to state to the jury that "the country is now perfectly tranquil," surely it seems as if a very ponderous hammer indeed had been put in motion to crush this butterfly of an insurrection. The Sheriff, or at least the Court of Justiciary, might, one would imagine, have been strong enough for the operation.

The jury were asked to hold Hardie guilty of "compassing and imagining the death of the King," at least the charge was not departed from; but it was admitted that the case against him came more distinctly under the second head of levying war. In his declaration Hardie stated that in "going out" he "did not mean the subversion of Government, but what he wanted was the restitution of the people's rights. That they wished annual Parliaments and elections by ballot. That the declarant does not mean that the people ever had annual Parliaments and elections by ballot, but that he conceived the people had a right to obtain what the majority of the nation applied for." Jeffrey, for the accused, brought no witnesses, and attempted very little in the way of cross-examination. He however tried to prevent a copy of the address over which the prisoner and magistrate had fought in the streets of Glasgow being received as evidence, contending that the prisoner could not be connected with it as a whole, because a part of it had been read in his presence. The objections were however repelled and the address admitted. Jeffrey's speech, which followed the closing of the case for the Crown, was an able one. Of course he did not seek to exonerate his client from all guilt in the matter. This would have been a hopeless task. He merely sought to induce the jury to apply to the offence some less serious name than that of High Treason. He had to admit that his client was armed, and "that being so armed, he was present at, and engaged both constructively and actively in, a skirmish with the lawful forces in the pay of the King, acting, I have no doubt, in what they considered, and what probably was, their duty." But he suggested that this conflict had been engaged in as an act of self-defence, and that there was no invasion of the troops to overthrow the Government. The reply was made by the Solicitor-General (Wedderburn), and the Lord President delivered his charge. The jury were warned that if they listened to the plea of mercy in the face of evidence and their oath, they were guilty of neither more nor less than wilful and corrupt perjury. In closing he said that he had given them his opinion. "I always thought it was a duty I

owed to a jury to let them know what my opinion was, that they might canvass it on the one hand, knowing, I hope, that my character was such that they would not lightly differ from me, but at the same time thinking that they would boldly differ from me if they were compelled to do so. But, on the other hand, if their opinion was against the prisoner, it would be satisfactory for them to know that such also was the opinion of the judge." The jury did not differ from him, but after twenty minutes' consultation they found the prisoner guilty of the charge of levying war and conspiring to levy war against the King.

Next day the Court took up the trial of John Baird, who had been present at Bonnymuir, and had acted as leader of one of the two divisions into which the little party had broken up previous to the meeting there. In arguing with Jeffrey over the evidence in this case, Sergeant Hullock (who certainly does remind us of English counsel of a much more distant date than 1820) spoke of "a pure palpable act of sheer unadulterated treason." Upon the conviction of Baird, which followed almost as a matter of course after that of Hardie, Jeffrey, on behalf of the rest of the Bonnymuir men, withdrew the plea of not guilty and tendered one of guilty.

This example was followed by the other prisoners from this district. The charge in the case of some was departed from, and the sentence was moved for against twenty-two, who were described by the Lord President as presenting the melancholy spectacle "of two-and-twenty subjects of their country who have forfeited their lives to its justice." Certainly it was a melancholy spectacle, and had the sentence then pronounced been carried out against them all, the 8th of September 1820 would have been a terrible day in the annals of Stirling. For on that day these unfortunate men were to be first hanged, then beheaded and quartered. Hardie and Baird did actually suffer death.

Let us now more briefly notice the further proceedings of this great Commission. We have seen that the Bonnymuir rising had its origin in Glasgow. In that city the Commission next proceeded to hold a sitting. James Wilson was the first prisoner tried. Wilson, a hosier in Strathaven, had marched with a sword, or rather with the blade of a sword, in his hand, along with a body of men armed with pikes and guns, and carrying a flag bearing the motto "Scotland Free or Scotland a Desert." Their destination was Glasgow, but learning on the road that Glasgow was not disposed to join them, they seem to have quietly dispersed. There was here no act of violence as in Hardie's case, but on the other hand the preparations made in the way of securing arms and ammunition seem to have been on a greater scale. Wilson was found guilty of compassing to levy war against the King. He was ably defended by John Archibald Murray, afterwards Lord Murray. On only one point, however, was his counsel successful. He managed to exclude the two declarations of the prisoner emitted

before different magistrates. The first magistrate had advised Wilson to be candid and speak the truth, and although the second had not repeated this advice, it was held that he had said nothing to undo the impression to which it might have given rise. In his second declaration he, the prisoner, had adhered to the former one.

Against the next prisoner in the list, William M'Intyre, the Lord Advocate led no evidence, and the jury returned a verdict of *not guilty*. The prisoner was suffered to depart after hearing a short sermon from the Lord President upon the danger he had escaped, the effect of his escape upon his future conduct, and in particular upon the perfection of our "glorious Constitution." He asks, "In the name of God what more is it possible for any constitution to provide for the people who live under it? Their rights and liberties are protected, against their fellow-citizens on the one hand, and against the Crown on the other, and the meanest individual, accused of crimes against the State, knows he will be tried with the same impartiality and regard to justice as the proudest noble in the land." M'Intyre was told to retire into the bosom of his family, to honest industry, and those habits which became his station, and that whatever rights he might have, that of governing others, or of reforming the State, or of making laws, never could belong to uneducated men like him. The other accused were then acquitted in the same way by a formal verdict, and the *sederunt* wound up by the sentence of death being pronounced upon the unfortunate Wilson. Although he had been recommended to mercy he was beheaded at Glasgow on 30th August 1820.

We next find the Commission in the parish church of Dumbarton, engaged in trying a Robert Munroe, a Dumbartonshire conspirator, accused of having assisted in the manufacture of pikes at a forge in that county. This long trial resulted unsuccessfully for the Crown, and the prisoner was acquitted. Lord President Hope told Munroe that he was a "poor, helpless, friendless, obscure individual." But his Lordship's charge was so favourable to the prisoner that the Crown abandoned their other Dumbarton cases, and the Commission proceeded to Paisley. Here took place (also in a church) the long trial of James Speirs, which occupies nearly a whole volume in Green's report. In this case an objection was taken by the prisoner's counsel to the admission of the declaration, on the ground that a prisoner's declaration in Scotland is different from an examination before a magistrate in England, and that it was by the law of this latter country that in this case they had to be guided. The Court were probably led by the opinion of one of their number, Chief Baron Shephard, who held that the distinction between the Scottish declaration and the English examination was merely nominal. This trial had a curious result. The jury at first returned a verdict of guilty of the fifteenth overt act in the first count of the indictment. This the Court would have construed as meaning guilty on the first count, but the jury were unwilling to have such an inter-



pretation put upon their verdict. After discussing the matter with the Lord Justice-Clerk they withdrew, but returned still determined to find nothing proved save this one act, that of striking work and compelling and persuading others to do the same. The unfortunate judge had to confess that he was not conversant with entering verdicts in such cases, and desired the assistance of one who knew more about it. This was the Lord Chief Baron, who proceeded to direct the jury, and told them that what they had returned was no verdict at all. The first count was the compassing of the death of the King, and this, the jury said, startled them. They could see that the prisoner had done what they found he had done, but they could not connect those acts with any design upon the King's life. And so after many judicial explanations and directions they again retired, and then gave the following verdict: "The jury pronounce James Speirs guilty, on Monday the 3rd of April last, of striking and giving up his work in a malicious and illegal manner; and that he did not only abstain from work himself, but did compel and oblige others of his fellow-subjects to do the same; and maliciously and illegally did hinder and obstruct and prevent divers manufactories of divers liege subjects from being proceeded in and carried on on that day." Of course they were told that this was no verdict, as it neither affirmed nor negatived the charge of treason, and for the fourth time they retired, returning at last with the verdict of *not guilty*.

The last place in which the Commission held sittings was Ayr. Thomas M'Kay, the first prisoner placed at the bar, pleaded guilty, and he was sentenced to death. The Crown then suffered the others in custody (three in number) to go free.

To sum up the results of these judicial proceedings, we may state that true bills were found in the various counties embraced within the Commission against nearly one hundred persons, of this number fifty-two failed to appear, two were acquitted after trial, twenty-four convicted either upon evidence or by their own confession, and the remainder acquitted without trials. Only three were, we believe, actually executed. The Commission held its first meeting on the 29th of June, and its last on the 9th of August 1820.

Looking to the serious light in which Government thought fit to view the disturbances which led to all this exhibition of judicial and forensic skill, it cannot be said that an undue amount of punishment was dealt out. If treason had been committed, three executions after so many convictions could not be wondered at.

This chapter of comparatively recent, although we imagine somewhat overlooked, Scottish history has, we trust, proved not altogether uninteresting to our readers. It serves strikingly to show us the advance made since the year of grace 1820. Such a miserable abortive rising as that of Bonnymuir would be simply impossible in these days, not only because enlightened rulers have removed the grievances under which former generations suffered, but because

of the spread of education and the increased means of communication. An army of thirty men marching out of Glasgow under a false impression that the whole country had risen to side with them, is only possible if we conceive gross carelessness on the part of the servants in some one of its lunatic asylums.

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## VITAL, SOCIAL, AND ECONOMIC STATISTICS OF GLASGOW.

FOR several years we have in our Journal noticed the annual volume with the prefixed title, which is edited by Mr. West Watson, the City Chamberlain of the second city of the United Kingdom. The work is worthy of notice as exhibiting many points of sociality which are invaluable to the jurist as well as the politician.

The reporter in his preliminary observations has been in use to contrast each year with its predecessor. In 1878 he expressed a hope that he would be able in the succeeding year to present a more favourable report than he then was compelled to give. He now admits, "That anticipation has not been realized, and with sorrow I make the remark that 1879 has not contributed much towards brightening the darkness of 1878." The reporter proceeds with some important observations on the state of trade and commerce. He dwells on the disastrous effects of the failure of the City of Glasgow Bank. He states that there were recovered from the unfortunate shareholders £9,309,032. Out of 1819 of their number "more than five-sixths were already found to have been under the dire necessity of surrendering *all* that they possessed, and of facing the world again, hopelessly and helplessly ruined." The reporter is pleased to compliment the liquidators for their zeal and energy, an encomium which we doubt not has been fully merited.

The first table gives the temperature and rainfall of 1879 and recent years. The reporter states "that the year commenced with an unusually bitter winter, and it was scarcely relieved until the arrival of the last quarter from an almost perpetual dampness, accompanied by a depression of temperature rarely experienced during so considerable a period. . . . It was not the mere *quantity* of the rainfall, which of itself can be scarcely called *inordinate*, but it was the *ceaseless drizzle*, which extended over the dreary period of 204 days, the low and wretched temperature, and the absence of the blessed sunshine which altogether formed such a combination as to complete the measure of the dismal and disastrous year."

The next table in the series shows the *natural* increase of the population during the last twenty-four years. The technical phrase

of *natural increase* is the difference in numbers between the recorded deaths and recorded births. The tables do present some strange anomalies. The reporter remarks, "A glance will almost startle the reader by its strange and inexplicable variations, for during the whole period included, our population has been advancing in numbers *steadily* though not *equably*, yet so far back as 1856 there was an actual increase of 4963, and in 1869, that is, thirteen years later, it amounted to only 2850. Again, in 1872 it amounted to 6097, and in 1877 reached the extent of 7269, yet in 1879 receded to 7191; and although the range of the whole long period varied from 2850 to 7269 (the figures already referred to), the average was 5025, or but a little beyond the amount of the starting year of the series." It might be observed, as explanatory perhaps of these singular eccentricities, that emigration and immigration cannot be well excluded. Many certainly born in Glasgow die elsewhere, and the converse is equally true, that many die in Glasgow whose birth was in other places.

The births of 1879 show 19,684, falling short of each of the preceding five years, and even of 1872. As usual the males preponderated, numbering 10,018, whilst the females were only 9666. The reporter adds, "The proportions which are remarked as applicable to Europe generally were thus exemplified again, being as usual almost exactly twenty-one boys to twenty girls."

"The tear and wear of life likewise continue to enforce their invariable natural effects, and gradually transpose the proportion of the sexes; for although so many more boys are born, and they maintain their majority in the matter of numbers up to above the age of fifteen, their numbers then become quickly and steadily equalized, until thereafter, and almost or always to the close of life, the female element continues to preponderate. . . . As observed for many previous years, the births of the year preponderate in the earlier months, and either March or April or May usually taking the lead. Upon the present occasion January, as it did last year, assumes a very prominent position, and February as usual exhibits a strange and peculiar modest claim. We cannot but bear in mind that it is a short month. Upon the present occasion, and it seems to be altogether a year of exceptions, September does *not* present the lowest birth-rate, although it retains as usual the proud pre-eminence of showing the lowest death-rate of the year."

The table of marriages is prefaced with the observation "that their numbers present an indication of the prosperity or adversity of the times." Accordingly the statistics of 1879 verify the fact that it has been a disastrous and disheartening year. The tables show the lowest numbers for the last ten years, falling 600 below the average recorded during the entire period. The greater number appears, as in former years, at the New Year season, and at the half-year's term at Martinmas. "The other term being Whitsunday, has not the same privilege because of the deeply-rooted

prejudice or superstition which exists in the Scottish mind against the success or good fortune of marriages celebrated in May."

In sequence the mortality tables come next. The deaths in 1879 were, 12,493, and which fell short of the average of twenty-five years, which has been 13,264. The total mortality of 1879 has been actually the lowest recorded during the long progress of seventeen consecutive years. The reporter adds, "Thus we see how favourable, from a sanitary point of view, has been the position of our population in the year 1879. This is very satisfactory when we regard the suffering and sorrow and deep distress, as well as the strange and depressing nature of the weather, which characterized that dismal year." The reporter expresses a suspicion that the public improvement operations "have tended to cause the dispossessed population to huddle closer together, and that although the inhabited houses have not increased in number so much as usual, they are likely to become more densely peopled." The reporter proceeds to detail the particular ailments which in 1879 chiefly afflicted the population. These tables are of great value to the medical profession.

One marvellous fact is worthy of notice, that "typhus, once actually the scourge and terror of this neighbourhood—destroying as it did 1138 victims in 1864, and 1177 in 1865, when the population was 140,000 under its present number—carried off but fifty individuals in all in 1878 and fifty-eight in 1879." The reporter observes that bronchitis and phthisis for many years exhibited a remarkable equality in their progress, but lately bronchitis has usurped and maintained an uncompromising ascendancy, and the result is that the aggregate of the ten years 1870 to 1879 exhibits an average annual mortality of 2383 from bronchitis and 1866 from phthisis. The reporter mournfully adds, "This seems all the more remarkable when we recognise the fact that although the mortal power of almost every other disease prevailing amongst us has waxed and waned from season to season and from time to time, and has been especially modified and mitigated during the year that has just departed, yet these two have ever been sweeping onwards, and too often upwards, in their cruel course, and, like the remorseless eagle facing the sun 'with an eye that never winks, and a wing that never quails, relentless, implacable, savage to the last.'"

The table of infantile mortality of 1879 gives some startling facts. Of the total of 5505 under five years of age no less than 1196 died under three months from their birth, 440 between three and six months, 1026 between six and twelve months, 1466 between twelve months and under two years, and 1377 between two and five years. This table deserves consideration alike by the physician and the jurist.

A table exhibits the interments in the burying-grounds of the

character of professional training. Time was when everything was done by written pleadings. Each step in each case was practically an elaborate written essay on the particular point met in its turn by an equally elaborate answer; the very quaint terms where there were replies and duplies, ay, and on to quadruplies, show how laboriously the counsel worked out their argument. Those were the days when a reference in an airy and skimming sort of way to one or two authorities of recent date, with a confident manner and loud voice, would not have weighed for an instant against the quietly-prepared paper worked up in the study, and bearing the tokens of the midnight oil (for they had not even gas in that age). The advocate, not content with mere precedent, sought to find the truer foundation of principle; the Pandects were searched and oft quotations carefully culled from their pages; the commentators on each passage were examined and their authority adduced to strengthen the doctrine or justify the deduction. Voet was quoted by those who not only knew how to pronounce his name, but had frequently studied his writings, while the beauties of Pothier were gathered by those who could well appreciate them. In the ordinary business of life, in the daily intercourse of society, we often encounter men who talk widely and strongly, more widely and more strongly, perhaps, than the subject of conversation in any degree warrants, yet those very men when they write upon those very subjects are cautious, calculating each word and balancing its weight and its effect. This is just, we think, what has happened in our legal profession in Scotland. In the days when the pleadings were all written, when oral pleading truly was not of much moment, certainly not to compare with what was down in the printer's black and white, the advocate felt that his words were of importance, that each phrase might have its effect, and that no argument could be thrown away with safety. The judges sat and listened, it may be faithfully, to all that was argued before them, but they read their papers and gave far greater effect to what they found in the prints than to what was merely dropped by the counsel at the bar. Hence the care necessary, and the references to those principles underlying each case by which alone the judicial mind could be affected; for we must not forget that the judges of those days were as different from the judges of the present day as the advocate or W.S. of 1820 differed from the advocate or W.S. of 1880.

We are not, however, by any means entirely the *laudatores temporis acti* that perhaps these observations may have caused us at first sight to appear. The present system has many advantages of its own; it has those advantages, however, at the expense of certain losses, and we are seeking to find the losses and the gains, and to compare them the one with the other. Perhaps there may be a considerable divergence in opinion, but we maintain that as one consequence of the change the Bar has very much gained in



its powers of elocution and of public speaking. There were very few indeed among our ranks in former days who could speak efficiently and forcibly, even though we had a Jury Court all to itself, and a Chief Commissioner to preside over it. Now though the speaking may as a logical and argumentative process be less satisfactory to the mind or to the hard head of the metaphysical Scot, yet the force and cogency are there, and, despite what our neighbours across the Tweed may say, the humour also. The ponderous device of writing down all your speech, and dressing it up in a shape suited for judicial digestion, weakened necessarily the memory for an impromptu address, and destroyed or at least materially injured that power of "thinking upon your legs" which is said to constitute the secret of oratorical success. Within the last few days the famous French advocate and orator Maître Lachaud succeeded in obtaining the acquittal of a Madame de Tilly, charged with and manifestly guilty of throwing vitriol in the face of a girl who was her rival in the affections of her husband, and we remember noticing that it was said that even tears were brought into the eyes of all present by the skilful eloquence of the great pleader. Now this is a kind of thing that has its advantages as well as its injurious effects, though we confess that as yet the Scottish advocate has to be found who will bring tears from the eyes of a jury of his countrymen. It may be a sentimental and wrong spirit which allows a jury to give way to their feelings and acquit merely because they are wrought upon by the practised speaker who appeals to them, and it may be an inferior kind of legal training which uses such arts in preference to more solid arguments, and yet at the same time the cultivation of such a talent is surely worthy of all praise, and an ambition to be able to use effectively the persuasive gift of eloquence is not less noble than the lettered and literary pride in the contemplation of an essay full of learning and full of argument, based upon principles as stable as the pillars of Hercules. It is curious to notice one alteration which has been synchronous with the change of pleading, though we should not be prepared to maintain that necessarily the one bears any relation to the other. That alteration is one very important to the whole profession, the rate of the fees paid to advocates for their work. In those days when all was done by writing, and when the delightfully innocent fiction was maintained that an advocate received nothing whatever for what he did, though no doubt in his magnificently patronizing way he always deigned to accept of an *honorarium*—in those days, we say, the Bar must have been much in the literal position of penny-a-liners so far as pay went. We have seen the fee-book of an advocate who was about 1810 in large practice, that is to say, his income at that time exceeded £700 a year, representing a much larger sum in these days, and yet in that book we found during a whole year only one fee of £5, 5s., and none of larger amount, while the vast pro-

portion of entries were for £1, 1s., representing the writing of the various pleadings of each stage of every litigation. Poorly though it was paid, so laborious in its character was this perpetual pen-work that it must have consumed a very large amount of time, and all whose age permits them to remember the latter years of these written pleadings unanimously bear testimony to the way in which the days and the nights of our professional predecessors were occupied. Another of the effects of the system of written pleadings has been probably to create the great difference between the English practice and our own as regards conveyancing. There the conveyancing business is still in the hands of the Bar, no doubt of a special section of that learned body, but it has not passed to the other branch of the profession as it has done in Scotland. The conveyancing work here originally was done by advocates if we go far enough back, but there can be little doubt that it was dropped by the Bar for the twofold reasons of want of time and ideas of dignity. The want of time was caused by the great amount of other writing to be got through, and the ideas of dignity probably were on a par with those which disdained fees whilst adhering to *honoraria*. Be this however as it may, the written pleading is strongly suspected of having helped to deprive the Bar of an important and lucrative branch of its business.

Having thus looked at the practical (but our friends may say debasing) considerations of filthy lucre in the matter of these written pleadings, we may turn again to the pleasant side of that old picture of the advocate hard at his written task, and think of the literary skill evoked and the depths of learning often revealed in the works of those mental giants, as some of them were. On our table as we write there lies a printed pleading of the deepest interest to literary persons. It bears date November 21, 1795, and it is signed "Walter Scott." We believe it to be a very early, probably the earliest, document in print bearing his name, and it further shows in a marked way the descriptive skill of his writings and his force and width and power of illustration. As a curious and rare literary production it may be interesting to give a sketch of the document and one or two quotations from it. It is in form a pleading in the High Court of Justiciary, proceeding by way of a now disused form of process, termed an "information for James Niven, presently a prisoner in the Tolbooth of Edinburgh, against his Majesty's advocate." From the print it appears that Niven was charged with murder, "or at least culpable homicide," in consequence of his having killed a man named Knox, a doorkeeper to the Faculty of Advocates, in a place called Libberton's Wynd, in Edinburgh. The prisoner, it appeared, was a young man who having served in the navy and met with an injury to his hand had been discharged. He had purchased a small iron cannon which he hoped to sell to some profit, and he exhibited its powers in this particular place on several occasions and without injury to any one;

but, as the indictment bore, on the particular day when Knox was killed he did "bring said small gun or cannon into the workshop of Ebenezer Wilson, founder, in Libberton's Wynd, in the city of Edinburgh, and did there load said gun or cannon with powder, a wadding of paper, some tobacco, and a piece of iron resembling in appearance part of a small bolt or large screw-nail; and having so loaded the said gun or cannon, carried it out and placed it on a step of the stair at the gate leading into the house of Robert Playfair, writer, in Libberton's Wynd, Edinburgh, and pointed the muzzle in a direction up said wynd." Knox, it appears, was standing there, and was killed in consequence of the prisoner having "wickedly and feloniously, or at least culpably," fired the cannon.

The circumstances and surroundings seem at once to take us back to Peter Peebles and "Redgauntlet;" the "wynd" where the accused had fired the cannon, indeed the very notion of amusing oneself in the heart of a city by the unmolested discharge of ordnance; then the writer who lives in a wynd, we wonder what sort of a house he kept; then, again, we are told that the victim was, when he lost his life, standing in the wynd "in conversation with Mrs. Helen Douglas, relict of James Baillie, Esq., late of Olivebank," which seems an odd conjunction for a doorkeeper of the Faculty. The quaintness runs through the whole print, which proceeds to give, after a short narrative, a couple of testimonials by naval officers certifying the prisoner to be a "*quiet good young man.*"

Mr. Scott then explained in his pleading that Niven had loaded the cannon with paper and tobacco, though why he used the latter was not explained, and rammed it down with an iron bolt, hammering the bolt "in order to increase the report," and leaving a splinter of the bolt unawares in the bore. The argument was twofold in favour of his not being answerable for the fatal result—first, "he did not know Mr. Knox and could have no malice against him. Nor did he observe either the deceased or any other person in the wynd when he fired. And secondly, he conceived the contents of the piece to be perfectly harmless. It appears from the print that these defences were stated probably in writing to the High Court of Justiciary, and that answers were made to them on the part of the Crown, after which the judges, "conceiving the case attended with some nicety," ordered informations. The panel pleaded "not guilty," and the young advocate in taking these preliminary objections seems to have been practically doing what we should now term objecting to the relevancy, or, using his own expression, "the relevancy of the libel and then that of the defences will be considered," both being, as he maintained, "with equal propriety subjects of argument in the informations." We may notice in passing that there occurs a well-known Scotticism where the advocate says, "the panel's counsel shall proceed to state the

general argument," meaning to use "will" instead of "shall." Coming to his argument, Mr. Scott shows both that ingenuity and that learning that might have been expected from him. In the first place he urged that there was no *dolus* or *animus occidendi* to raise the charge to that of murder, though the prosecutor contended that from the nature of the weapon, and from its position, the action of the prisoner was reckless as that of "the Malay gamester, who, when rendered desperate by his losses, rushes out into the streets, stabbing whoever comes in his way, till he is overpowered and killed like a wild beast." The defence as to the weapon was that it was a mere toy, and Hadrian's Rescript and Carpzovius the commentator were quoted to show that this difference was important.

He, it is added, who uses a sword must be supposed to have intended the death of his adversary, because his weapon being constructed for such a purpose, he could not even unsheathe it without being reminded by the unavoidable association of ideas of the use for which it was forged. On the contrary, he who employs a key, an iron tool, or whatever else comes first to hand, cannot be presumed to have had any such determinedly mortal purpose. According to this doctrine it will be vain for the pursuer to point out the size of the cannon, or its capacity of discharging a shot which might kill a man; since it cannot be numbered "*inter arma quibus vere similiter et regulariter homines interfici possunt.*"

Quoting further another dictum as to a soldier, Mr. Scott pointed out that "if the learned civilians hold with justice that a soldier in such a place using the weapon constructed and put into his hands for slaughter is guilty only of *culpable homicide*, it does not appear how the panel diverting himself with a plaything commonly used by boys can in the same situation be convicted of *murder*." From the weapon itself the advocate for the prisoner proceeded to consider the circumstances of the place, and very ingeniously to press upon the Court that even with the statement of the prosecution taken as admitted there was no more than *culpa* in the matter. The argument practically was that the slope of the wynd was really rather a safe place to fire into, and that there was merely incautious raising of the muzzle or perhaps repercussion from a stone. But the last and strongest point urged is that of "the frequent practice, whether proper or improper, of using this amusement in the streets. It is a matter of public notoriety that boys of all ages and descriptions are, or at least till the late very proper proclamation of the magistrates, *were* to be seen every evening in almost every corner of the city amusing themselves with fireworks and small cannons; and that without being checked or interfered with." The argument that the act of the panel being *versaus in illicit* rendered him liable for all consequences is amusingly met by the illustration we append: "If a poacher shooting at game should accidentally kill a man, his being unqualified will not surely aggravate the offence into murder, if it would not have been such in a person having a licence."

We seem to remember, apropos of this, a doctrine at one time held by the English lawyers and recognised by judicial authority there, to this general effect, although we have not at hand the means of more precise verification. Suppose the life of a man to be taken by pure accident by a shot from the gun of a person shooting over the lands where the accident has occurred, the culpability of the person would, *mirabile dictu*, have varied with his circumstances as regards his right to be there shooting at all. If he is there as the proprietor of the land, shooting where he has full right to shoot, the whole affair is held to have been, what it truly was, a pure accident, and no criminal consequences can ensue; if, on the other hand, he is a poacher, shooting game where he has no right and contravening the game laws, then the offence is one of manslaughter, though it has been, as we have premised, an accident in itself; and lastly, if the man who fired the gun was there as a thief to shoot, for instance, a domestic fowl, and in attempting to do so accidentally struck and killed the victim, that would amount to murder. We have been led into this digression by the similarity of the doctrine once held in England with that so carefully and so soundly repudiated by Mr. Scott as the law in Scotland, although in a subsequent passage he is cautious enough to meet any question arising out of the application of the doctrine by significantly observing that it was all-important in such cases that there should be absence of felonious intention, and that "in the panel's case his intention was so far from being felonious, that had he discharged his gun without any accident as formerly, his doing so certainly could only have ranked as a petty trespass against police."

That it should have been necessary gravely to urge these arguments in order to save a man's life for the offence committed may seem strange in this more enlightened age, but the anxiety of the counsel for the defence lest the halter should be the fate of his client is so manifest that we cannot doubt that he had good grounds for alarm on this score. Laying down the doctrine broadly that gross negligence will not in criminalities be held equal to dole, Mr. Scott shows his learning and research by many a quotation from the laws of Rome, of England, and of our own country. In the Roman law he refers to the *Lex Aquilia* and the *Lex Cornelia de Sicariis*, to Voet and to Gomesius; among English authorities, Coke, Chief-Justice Hales, and Blackstone, with instances and authorities, are cited. Coming finally to our own municipal law, he says "research has not been spared" to find analogous cases, and expresses a hope that at least so much has been the result of the investigation as to convince the Court that the law of Scotland does not exact a severer punishment in such cases than the laws of England or of Rome. After giving the dicta of Sir George Mackenzie upon the point, we find in this remarkable paper three cases cited, and we think it best to give them in the concise and elegant language of the learned advocate:—



In *Carmichael's* case, 14th September 1699, that person was indicted for having lashed John Douglas, his scholar, with whips of strong bend leather till he was weary; and that having rested himself he did so again, and thereafter drove the child's breast against the corner of a desk, which rendered him senseless, notwithstanding which he repeated his barbarous conduct till death ensued. The counsel for the prosecutor did, however, after long and learned informations, think proper to restrict the libel to an arbitrary punishment, which could only proceed from a conviction that however cruel and unfeeling the conduct of Carmichael had been, still it was destitute of that *animus occidendi* necessary to bear out an indictment for murder. In the noted case of *Carlops v. Loudoun*, these gentlemen were found guilty of having beat the deceased David Redpath with sticks, who died in consequence thereof; the beating was *per plures commissum*, and they both had swords about them but did not make use of them. They were only punished by a fine. March 12, 1713, Jean Ramsay was found guilty by the special verdict of a jury "of dragging a weak silly man out of a bed, upon a chest and floor, and that thereby he was wounded and bled; and the said weak infirm man was dead next morning about eight o'clock." The female fiend who was guilty of this barbarity had no provocation except that the infirm wretch had been charitably taken up in the street and laid upon a bed belonging to her, for which she had no use; yet she was only condemned to an arbitrary punishment, an instance strongly in point, since it clearly shows that no virulence nor excess of unprovoked malice can subject the panel to a charge of murder provided it stops short of the *animus occidendi*. Comparing any, the most favourable, of these cases with that of the panel, the balance must be allowed to incline strongly in his favour. In every one of them was displayed an intention to hurt and maltreat the deceased in such a manner as in a certain degree to hazard fatal consequences. But the panel in the discharge of his cannon had no view further than his own amusement; and the unfortunate slaughter which took place was so far from being his object that, supposing him to be a rational being, he cannot have had the purpose of doing the slightest injury to Mr. Knox, the deceased, whom he did not even know. He therefore may, surely, with better grace than any of the panels above mentioned, crave to have the libel restricted to a charge of culpable homicide, supposing, as we have all along done, that he shall have been guilty of *culpa lata*.

It may be observed that the inhuman dominie and the "gentlemen" with the sticks who beat their miserable victims to death might not nowadays have fared so well as in an age when influence and interest affected even the fountains of justice; nevertheless the argument for Niven was powerful and complete.

Turning from this point in the case to his own defences for the prisoner, the panel's advocate observed that these chiefly consisted of a denial of knowledge that the gun contained anything capable of doing harm. A certain degree of blame is attached to every instance of this kind of accident, because it might by the utmost care have been avoided. The argument is then continued by another apt illustration as follows:—

A well-known and affecting story will illustrate this proposition. A young gentleman just married to a lady of whom he was passionately fond, in affectionate trifling presented at her a pistol from which he had drawn the charge some days before. The lady, entering into the joke, desired him to fire. He did so, and shot her dead; the pistol having been charged by his servant without his knowledge. Can any one read this story and feel any emotion but that of sympathy towards the unhappy husband? can they even connect his --- with the idea of punishment? Yet, divesting it of those interesting cir-

cumstances which act upon the imagination, it is precisely that of the panel at your Lordships' bar.

We have given perhaps at too great length extracts from this curious information, but in concluding our reference to it we venture to quote at length the final paragraph as a good example of the style in Mr. Scott as a young man which became so famous in the Sir Walter Scott of more mature years :—

Guilt, he says, as an object of legal punishment, has its origin in the mind and intention of the actor, and therefore where that is wanting there is no proper object of chastisement. A madman, for example, can no more properly be said to be guilty of a murder than the sword with which he commits it, both being equally incapable of intending injury. In the present case, in like manner, although it ought no doubt to be matter of deep sorrow and contrition to the panel that his folly should have occasioned the loss of life to a fellow-creature, yet, as that folly can neither be termed malice nor yet doth amount to gross negligence, he ought rather to be pitied than condemned. The fact done can never be recalled, and it rests with your Lordships to consider the case of this unfortunate young man, who has served his country in a humble though useful station, deserved such a character as is given him in the letter of his officers, and been disabled in that service, you will best judge how far (considering he has suffered a confinement of nearly six months) he can in humanity be the object of farther or severer punishment for a deed of which his mind at least, if not his hand, was guiltless. Where a case is attended with such nicety, your Lordships will allow Mercy to incline the balance of Justice, well considering with the legislator of the East, "It is better ten guilty should escape, than that one innocent man should perish in his innocence."—In respect whereof

WALTER SCOTT.

Such, then, was one of the many and elaborate papers that a system of written pleadings produced, and indeed until the Act of 1860, though very unusual, it was still competent for the Lords Ordinary to order written pleadings. Under that statute, however, the power of making such an order was confined to the Inner House, and for all practical purposes even there it may be said to be in desuetude, so that in the appeal cases to the House of Lords alone can any opportunity for written argumentative pleading be found. As we have remarked, the race of judges of this day would probably regard with some degree of impatience, to say the least of it, any exposition of the old principles and authorities upon which those forms of earlier days were based. Rarely, indeed, are counsel heard quoting long passages as of yore from the Digest and the Commentators, even a reference to Morrison's Dictionary for authorities is regarded as musty, and the Faculty decisions or the earlier volumes of Shaw's Reports have not a very telling effect; something dug out of the current series, or perhaps what is not much more than an *obiter dictum* at best of a judge whose personal existence is a matter of memory to yet living men, is better than older decisions with the Court nowadays. In many respects it is better that this should be so, but not in all. For example, often the English or American or German reports, especially the two former, supply valuable illustrations and show the views of great lawyers

in circumstances akin to those before the Court, and yet counsel who have at great pains examined into these matters (and there *are* such counsel yet) find that their treatment by the Court does not repay the toil of the investigation. We have referred on other occasions to this growing and dangerous love of passing on "from precedent to precedent," and have expressed a hope that it may not go too far; yet the profession cannot be too much on its guard against a system which ultimately, if pressed, leads to absurdity and anachronism, as it did with the Romans long ago. Our shelves are filling too fast, there is too much reporting, and yet in some things not enough; but the voice of the country must ere long be raised, and when it is raised it will be to swell the cry already heard from many an eminent jurist urging us to clean this Augean stable and to lock our troubles, at least for a time, in the fetters of a Code.

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## DRINKS, DRINKERS, AND DRINKING.

(*From the "Albany Law Journal."*)

THE dry and thirsty days of summer are here once more. Drinking is the order of the day. Our bodies require to be constantly moistened internally, else with the thermometer among the nineties quickly would the human form divine become little heaps of dust and ashes. If we cannot drink just now let us think about it. Longfellow says, "He who drinks beer, thinks beer; and he who drinks wine, thinks wine." Let us for a few minutes fondly imagine the converse of this to be true, and while we think of beer, cider, wine, and ale let us drink in fancy.

In dealing with this subject let us take the division suggested by Lindley Murray's definition of a noun, and speak of "person, place, and thing."

Then, firstly, as to the "person." A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days (*Com. v. M'Namee*, 112 Mass. 285). The rule of law is that things are presumed to continue *in statu quo*.

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold (*Magahay v. Magahay*, 35 Mich. 210).

The phrase "addicted to the excessive use of intoxicating liquors" means not the occasional excessive use, but the habitual excessive use (*Mowry v. Home Ins. Co.*, 1 Big. Life and Acc. Ins. Co. Cas. 698).

A court being called upon to define in an insurance case what was meant by saying that "a man had always been sober and

temperate," very wisely concluded that such a thing could not be said of one who although usually sober and temperate in his habits yet occasionally indulges in drunken debauches which sometimes end in *delirium tremens* (*Mutual Benefit Life Ins. Co. v. Hotterhoff*, 2 Cin. Sup. Ct.).

To say that a man is "intemperate" does not necessarily imply that he is in the habit of getting drunk (*Mullinex v. People*, 76 Ill. 211). We fancy, however, the courts would not hold the converse of this.

A "saloon-keeper" is one who retails cigars, liquors, *et hoc genus omne* (*Cahill v. Campbell*, 105 Mass. 60).

In England one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at an hotel (to keep the water down, we suppose), was held by the Court of Common Pleas to be a "traveller" (*Pepler v. Richardson*, L. R., 4 C. P. 168).

England is a small country; one cannot travel far in any direction there without getting his feet damp, like Kanute and his friends. We presume this is why what would here be called "taking a stroll" is there dignified by the name of "travelling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard and said that he was twenty-one was no proof that he was an adult (*Gelty v. State*, 41 Ind. 162).

The Bench doubtless believed that although every American boy may become President, still every one is not a George Washington; but that, as Mark Twain says, "some Americans will lie." As to beards, nature occasionally "bursts out with a chin-tuft" before her turn, or where she should not.

Now as to "place." Judges do not exactly know—at least when on the Bench—what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments (*Kelson v. Mayor of Ann Arbor*, 26 Mich. 325); or that it may mean a room for the reception of company, or for an exhibition of works of art, etc. (*State v. Mansker*, 36 Tex. 364). This latter idea shows how high-toned Texan judges are, and that they have travelled in foreign parts. Neither an enclosed park of four acres in extent, nor an unenclosed and uncovered platform erected for the votaries of the Terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute forbidding Sunday selling of intoxicating liquors, etc. (*State v. Barr*, 39 Conn. 41.)

We opine that the Texan court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good and the dresses of any worth these would be an exhibition of works of art.

A "cellar" may be referred to as "the above-mentioned house" (*Com. v. Intoxicating Liquors*, 105 Mass. 181). In England it was held that a covenant not to use a house as a "beer-house" was not broken by the sale under a licence of beer by retail to be consumed off the premises (*L. & N. W. Railway v. Garnett*, L. R., 9 Ex. 26). One Schofield had a licence to sell beer "not to be drunk on the premises." The bar-tender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it standing on the Queen's highway, but as close as possible to the window. The Court of Queen's Bench considered that this was not a case of selling beer "to be consumed on the premises" (*Deal v. Schofield*, L. R., 3 Q. B. 8).

As to the "thing" itself. The phrase "spirituous liquors" does not include "fermented liquors" (*State v. Adams*, 51 N. H. 568).

Cider is not a "vinous liquor" (*Feldman v. Morrison*, 1 Ill. App. 469). This seems reasonable enough in view of the decision that "vinous liquors" mean liquors made from the juice of the grape (*Adler v. State*, 55 Ala. 16).

A "dram" in common parlance in Texas means something that has alcohol in it—something that can intoxicate; at least so say the judges (*Lacy v. State*, 32 Tex. 227).

Some years ago in Indiana they were very virtuous, and the court decided that the mere opinion of a witness that common "brewer's beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients or mode of manufacture; and the court could not take judicial notice that it was intoxicating (*Glase v. State*, 43 Ind. 483).

But alas for the good old days and the childlike innocence of judges and jurymen! Now both courts and juries in that State will take notice of the fact that "whisky" is an intoxicating drink without any proof (*Eagen v. State*, 53 Ind. 162).

In Massachusetts a jury was held warranted in finding "ale" to be intoxicating merely on the testimony of a witness who saw and smelled but did not taste it (*Haines v. Hanrahan*, 105 Mass. 480). Perhaps these twelve men, good and true, had had a view themselves.

In Maine one may be indicted and convicted for selling for tippling purposes "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating (*State v. Page*, 66 Me. 418).

How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their withdrawing-room, as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice Creswell did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr. —, why not?" queried the judge; "water is neither 'meat' nor 'fire,' and no sane



man can say it is 'drink;' let the jury have as much as they want."

The "Sabbath night" includes as well the time between midnight on Saturday and daylight on Sunday as the time between dark on Sunday and midnight (*Kroer v. People*, 78 Ill. 294).

In England "habitual drunkenness" is not cruelty in the eye of the law (*N.B.*—'Tis strange that justice should be blind and law a Polyphemus) so to entitle a wife to divorce (L. R., 1 P. & M. 46).

As to the mode of selling, Richards, C.-J., thought that selling a "bottle of brandy" for \$1.25 was selling by retail (*Reg. v. Durham*, 35 U. C. R. 508); and in another case Haggerty, C.-J., said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail (*Reg. v. Strachan*, 20 C. P. 184). While in Illinois the court held that proof that intoxicating liquors were retailed "by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat., 1845, *Lappington v. Carter*, 67 Ill. 482. See also *United States v. Jackson*, 1 Hugh, 531). The judges of this court clearly never heard of the Duke of Tenterbelly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming should he be false to their laws, "Let never this goodly formed goblet of wine go jovially through me," and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail and lick it off, as he did."

Now that we have finished we fear that the foregoing will not prove as satisfying as the descriptions of Hawthorne's old Inspector, and that not only is the reader and the writer, but also the thing written is "dry."

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## LIMITATION OF CARRIERS' LIABILITY—CONDITIONS IN PASSENGERS' TICKETS.

IN our last number, in an article on conditions in "Left-Luggage" tickets (*ante*, p. 397), suggested by the recent case of *Handon v. Caledonian Railway Company*, we made a passing reference to the cases upon the effect of conditions in passengers' travelling tickets, and referred to the conflicting nature of these cases. We purpose in this article to give an account of these, and to state the principles which have governed this class of cases, and the principles which in our opinion ought to govern them.

The question is this, Is a passenger bound by a condition in a railway or steamboat ticket, or in a book of railway coupons, freeing the company totally or partially from the responsibility of carriers, to which condition his attention has not been called, which

in point of fact he has not read, and of which he is in total ignorance? In the absence of authority, one would at once answer that the passenger was not so bound. But there are cases, and we have specially in our view one decided within the last twelve months in which a different answer was returned. Our Scottish law has been jealous, wholesomely and laudably jealous, of the limitations which carriers have sought to place upon their common-law liability methods by which at various times they have sought to elude it. The English Courts have not been so jealous; but after the decision of the House of Lords in *Henderson v. Stevenson* (2 Rettie, H. L. 71) it was thought that a pretty authoritative declaration, which the English Courts would be constrained to obey in the spirit as well as the letter, had been given in favour of the view to which the Scottish legal mind has tended, viz. that in order to make any limitation of a company's liability effectual, the assent of the passenger is required, and it is for the carrier to prove it. But after reading the decision in *Burke v. South-Eastern Railway Company* (5 C. P. Div. 1), it would seem that the English Courts are inclined to take "a turn astarn." We are quite aware that in that case the Court of Common Pleas Division almost protested against the idea of their going against the judgment of the House of Lords; but they did something very like it, all the same. Indeed it was very soon seen that the decision in *Henderson's* case was not relished in England. Only three days had elapsed when Baron Bramwell, in the unreported case of *Thompson v. Royal Mail Steam Packet Company*, stated that in the remarks he was making he wished to imply no disrespect to the decision of the House of Lords;—but, to employ a celebrated simile, evidently "the situation was dangerous," and there might be heard an ominous "rumbling of the sea."

The history of the law on the subject of limitations on the common-law responsibilities of common carriers is curious and interesting. It is a history of vicissitudes. There are two parts of the subject and two questions involved which are often not sufficiently discriminated, but which are totally distinct. (1) *Can* the carrier free himself from the responsibility imposed upon him by the edict in Scotland, or by the custom of the realm in England; and if so, how far can he do so? can he free himself from *all* responsibility? (2) Assuming that he is entitled to do so, how is he to exercise this power? by what means is he to effect this limitation?

On these questions there have been various opinions at various stages of the law. On the one hand, it may be said that if a carrier can at his own hand free himself from his common-law liability, what is the use of talking about liability being imposed by the common law? A liability which can be got rid of at choice is no liability at all. On the other hand, it is said, a bargain is a bargain. The truth is that these views are not antagonistic. We may hold that a bargain is a bargain, that if the passenger or sender

of goods assents to the conditions in the contract of carriage, he is bound by his contract as he is bound by any other contract; but that in order to be bound he must assent, and that his assent must be given in circumstances in which it is possible to refuse, and further, that he is entitled to refuse.

The right of carriers to make some limitation and in certain cases of their common-law responsibilities was asserted at a very early period, and indeed such a right can hardly be denied. If, as Mr. Bell has pointed out in his Commentaries, the goods carried are out of his general run of goods, or if the goods were of small bulk but large value, so that the charge for conveyance was utterly out of proportion to the risk incurred, it was reasonable that the carrier should have right to restrict his liability, should have right to refuse the goods, and should have right to charge at an extra rate if he did receive them. There is nothing unreasonable or inequitable in this. "There seems," says Mr. Bell, writing in 1821, "to be only one point to which legitimately notices of public carriers can be admitted, viz. the regulation of the consideration for risk. Saving always the power of making an express contract, the effect of a mere notice ought justly to be restricted to this point; as to which alone it is competent for a carrier to refuse employment." In his commentaries on the law of Bailments, published in America in 1832, Mr. Justice Story says, "It was formerly a question of much doubt how far common carriers on land could by contract limit their responsibility upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common-law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's* case (4 Rep. 83 b), and it was admitted in *Morse v. Slue* (1 Vent. 238)."

There seems to have been little doubt about this part of the question. But the question whether a carrier could obtain a total exemption from his common-law liabilities is one of a more ticklish character and one to which different answers have been returned at different stages of the law. So far back as the time of the "Doctor and Student" we read, "If the carrier should perchance refuse the stuffe, unless promise were made to him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and good manners, and so it is in all other cases like."

The traveller, observes an American judge, Mr. Justice Cowen, "is under a sort of moral duress, a necessity of employing the common carrier; and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a

common carrier for his own benefit, and a mandatory or less to his employer. He is a public servant, with certain duties defined by law; and, as Ashurst, J., said of the duties of innkeepers, they are indelible." In continuation of the passage before quoted, Mr. Justice Story says, "Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants as he would be in the case of his own personal fraud or misconduct."

Whatever may have been the state of the law on the subject at one time, there can be no doubt about what it is now and has been for a long time. In *Peek v. North Staffordshire Railway Company* (32 L. J. R. (Q. B.) 241), decided in 1862, Mr. Justice Blackburn, in the opinion submitted by him to the House of Lords as one of the consulted judges, observed that the passage last quoted from Mr. Justice Story's Commentaries stated, as he thought, accurately what was the effect of the decisions up to that time (1832); but he added that it was not law at a later period, and hence the passing of the Railway and Canal Traffic Act of 1854, an Act which imposed limitations on the right of companies to make any conditions they chose, which their practical monopoly had enabled them to do—the limitations being that the condition shall be reasonable, and that it shall be signed by the party against whom it may operate. Some cases just before the Act was passed illustrate the newer view taken that a special contract assented to must be held binding, however far the condition limiting responsibility might be carried. Thus in *Shaw v. North Midland Railway Company* (18 L. J. R. (Q. B.) 181) (1849) a condition in the ticket that "the company will not be responsible for any injury or damage howsoever caused" received effect, although the horse sent by the consignor was injured through the insufficiency of the carriage. In *Austin v. Manchester, Sheffield, and Lincolnshire Railway Company* (20 L. J. R. (Q. B.) 440) (1851) a condition in the ticket signed by the consignor by which he took upon himself the risks of conveyance received effect. In *Chippendale v. Lancashire and Yorkshire Railway Company* (21 L. J. R. (Q. B.) 22) (1851) a condition received effect which protected the railway company from liability for any injury, even when the injury was caused by the insufficiency of the carriage. In a second case of *Austin* relative to the same matter (*Austin v. Manchester, Sheffield, and Lincolnshire Railway Company*, 21 L. J. R. (C. P.) 179) (1852) a condition protecting the company from liability for loss arising through the negligence of the company's servants received effect, although gross and culpable

negligence on the part of the servants was averred and proved. "Whether it was called negligence merely," said Creswell, J., "or gross negligence, or culpable negligence, or whatever other epithet might be applied to it, it was within the exception." In *Carr v. Lancashire and Yorkshire Railway Company* (21 L. J. R. (Ex.) 261) (1852) the declaration stated that a horse was received by defendants to be carried for hire in a horse-box subject to the conditions in a notice at the foot of a ticket: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to the live-stock of any description travelling upon the" defendants' railway. Improper conduct, gross negligence, and want of proper care on the part of the defendants were alleged. It was proved that the horse-box was propelled against some trucks, and the horse thereby killed. The jury found that the accident was occasioned by the gross negligence of the defendants, and the finding was not complained of. Nevertheless judgment was arrested. This case shows how emphatically the view was supported that a condition once entered into must receive effect, to whatever extent it might carry the exemption from the ordinary responsibilities of carriers. Mr. Baron Parke said, "It is not for us to fritter away the true sense and meaning of these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our consideration, but it must be left to the Legislature, who may if they please put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used according to their proper meaning, and according to the true meaning and intention of the parties as here expressed." In *Walker v. York and North Midland Railway Company* (23 L. J. R. (Q. B.) 73) a condition in a notice served on customers of the railway company that the company would not be held responsible for injury to fish sent by their line was given effect to. We may question the soundness of the decision on another point, viz. whether the customer had assented to the condition. Notices had been served on the fishermen stating that the company would not carry except on the condition mentioned. The fishermen objected, tore up the notices, and something like a riot occurred. Afterwards the plaintiff sent fish to be conveyed by the railway. The judge directed the jury that they might infer a special contract from receipt of the notice by the plaintiff and his afterwards sending the goods, unless he unambiguously refused to accept of these conditions and the company acquiesced in his refusal. The Court of Queen's Bench approved the direction. We very much question the correctness of the ruling. The plaintiff's sending the goods after he had protested against the condition might more naturally be held to be an act done on the footing of the protest than on the footing of an acquiescence in the company's conditions; and it was for the company



to prove assent to a special contract limiting their ordinary responsibility. It is to be remembered that at common law while the consignor of goods is not bound to accept the conditions of the carrier he can insist on his goods being carried (*Crouch's case*, 23 L. J. R. (C. P.) 73). See, however, the observations of Erle, C.-J., in *M'Manus v. Lancashire and Yorkshire Railway Company*, 28 L. J. R. (Ex.) at p. 354). However, this case of *Walker* clearly confirmed the principle of the carrier's right to limit his responsibility. Similar decisions were given in *Great Northern Railway Company v. Morville* (21 L. J. R. (Q. B.) 319); *York, Newcastle, and Berwick Railway Company v. Crisp* (14 Com. B. R. 527); *Hughes v. Great Western Railway Company* (14 Com. B. R. 637); *Slim v. Great Northern Railway Company* (14 Com. B. R. 647).

The old principle that a carrier could not free himself from all liability was not given up without a struggle. An attempt was made, and for a time successfully made, to construe a condition of this kind in a non-natural sense, and to hold that however broadly a condition of exemption was expressed, it did not cover a case of gross negligence. The motive which inspired the attempt is obvious. It was the repugnance to allow the carrier totally to exempt himself from his common-law liabilities. In *Lyon v. Mells* (5 East. 438) Lord Ellenborough observed: "It is impossible without outraging common sense so to construe a special contract for the carriage of goods as to make the carrier say, 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable for any loss or injury occasioned by our own misconduct, be it ever so gross or injurious.'" In *Maving v. Tod* (1 Stark, 74) his Lordship expressed a different opinion: "Since carriers can limit their responsibility to a particular sum, they can exclude it altogether." These two opinions of Lord Ellenborough just illustrate the ebb and flow of opinion upon the subject. In *Bodenham v. Bennett* (4 Price, 31) Wood, J., observed: "The case of *Morse v. Shue* (1 Ventr. 238) pressed extremely hard on common carriers. Then special conditions were introduced for the purpose of protecting carriers from extraordinary events, but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would intrust their goods to carriers on such terms. It only means that they will not be answerable for extraordinary events; but we need not in this case lay down that rule. Here has been extraordinary negligence, and in all cases of that sort carriers are liable." And in *Smith v. Horne* (1818) (8 Taunt. 144) Graham, B., observed: "By the old law the carrier was bound to take the strictest care of the property intrusted to him; but of late it has been conceded, particularly in *Nicholson v. Willan*, where Lord Ellenborough gave up his former opinion, that the liability of the carrier may be qualified, and that he may require an additional premium for the risk he runs; but yet he must take due care of parcels, and if he

neglects them he is still liable. And in the same case, Burroughs, B., while lamenting that the doctrine of notice had ever been introduced into Westminster Hall, said, "Notice does not constitute a special contract, if it did it must be shown on the record; it only arises in defence of the carrier, and here it is rebutted by proof of positive negligence." So late as the case *Wyld v. Pickford* (8 M. and W. 443), decided in 1841, it was held that a condition that the company would not be "responsible for loss or damage" unless insured did not exempt from the consequences of gross negligence, not indeed because such a condition was void in law, but because, on the authorities, the condition was not to be so construed. In the above-noted case of *Shaw v. North Midland Railway Company*, Baron Alderson held the condition that the company would not be responsible for any loss or damage, howsoever caused, was subject to the implied exception of loss arising from the insufficiency of the carriage. But the Court of Queen's Bench considered this a bad ruling. Indeed the Court could do nothing else after the case of *Hinton v. Dibbin* (11 L. J. R. (Q. B.) 113), in which the condition in the Carriers' Act of 1832, "not liable for loss or injury," was held to cover loss from negligence as well as loss from accident.<sup>1</sup> The same construction was to be placed on the words when occurring in a private contract as was placed on them when they occurred in a statute.

The cases of *Shaw*, *Chippendale*, *Austin*, etc., above cited, are since the passing of the Railway and Canal Traffic Act of 1854 no longer applicable to the carriage of goods. But they express the principle of the common law, and it is on the common law we must fall back when we consider the validity of conditions as to the carriage of passengers, which is not as yet regulated by any statute. We think the later doctrine of the English law is a sound one. A bargain is a bargain. In the passage quoted from an American judge the case of a carrier is likened to that of an innkeeper. But why should not a condition made by an innkeeper, even limiting his liability, be held good if it is assented to by the guest? Of course the assent must be given in circumstances where the guest has an opportunity of refusing, and the guest has right to refuse assent to the condition, and a right to demand accommodation on the ordinary terms.

If the English judges have gone wrong, it is not in holding that a bargain is a bargain and is binding, although it totally excludes liability; but in failing to keep sufficiently in view what it is that constitutes a bargain—that assent must be given to the condition by the person whom the condition seeks to deprive of his ordinary rights; in failing to keep in view the character which the acts must have in order to entitle one to infer assent from them; in failing to keep in view the peculiar position of persons dealing

<sup>1</sup> It may be remarked that there is one thing which the most extensive condition does not cover, and that is misfeasance.

with railway companies arising from the company's virtual monopoly—a consideration which ought to lead one narrowly to scan the circumstances in which the acts are done from which assent is to be inferred, and to see that these acts are done in circumstances in which there is practically the option of withholding assent.

It being, accordingly, now assumed that a condition exempting the carrier from all the common-law responsibilities of carriers would not be void in law, the next question is, by what means is the carrier enabled to effect a limitation of his liability?

Long ago carriers sought to restrain their liability by giving notices that they would not be responsible for loss except on certain conditions limiting their responsibility. It does not appear at what time this practice commenced, but in the case of *Gibbon v. Poynter* (4 Burr. 2299) in 1769 the effect of such notices is discussed, and it is evident that they were well known even then.<sup>1</sup>

In relation to the carriage of goods, Mr. Bell says in his Commentaries in 1821 (i. 472), "A sense of the severe responsibility laid on common carriers has given admission to a sort of limitation by means of notices in newspapers and placards in the carrier's office, which the judges in England are now sensible has been allowed to go too far, and against the evils of which they contemplate no remedy but by the Legislature;" and for which a remedy *was* provided by the Carriers' Act of 1832 (1 Will. IV. c. 68), which protected the carrier by freeing him from responsibility for goods of a certain class and of a certain value, unless the value were declared and an extra rate paid to recompense the carrier for the extra risk; and protected the public by enacting that no public notice or declaration limiting responsibility should have any effect, while leaving intact special contracts for the conveyance of goods. And, as we have seen, the Railway and Canal Traffic Act of 1854 still further protected the public. In the above passage Mr. Bell goes on to say that there had not yet in Scotland been any encroachment on the principles which ought to regulate this matter, "and the doctrine adopted seems at once consistent with the law of the contract and with the public policy which has been introduced into this class of cases." The practice of giving notice and the effect given to notices were carried to a preposterous extent. A notice in a newspaper which a man was accustomed to read was held to bind him. So did a notice in a placard stuck up in the coach office. A condition in a notice stuck up in the office lost its effect because handbills of a different import were circulated. Anything, indeed, seems to have passed for a notice. One is reminded of the line of Aristophanes as to what came under the denomination of a "bird"—

"Nor aught is there by augury but for a bird may pass  
A word, a sign, a sound, a sneeze, a servant, or an ass."

<sup>1</sup> Burroughs, J., must have been in error when he said in *Smith v. Horne* (8 Taunt. 141) that the doctrine of notice was not known till the case of *Forward v. Ward* (1 T. R. 27), decided in 1785.

In considering the subject of "notices" and the cases thereon, the real question for inquiry and research is how far they operated in restricting the common-law liability of carriers, and what was the principle upon which they received effect. (It may here be remarked that those cases as to goods decided before the passing of the Carriers' Act of 1832, and before the Railway and Canal Traffic Act of 1854, although obsolete for the most part<sup>1</sup> in regard to the special matter to which they related—goods—deserve and require consideration on account of the common-law principles they lay down, and it is the common law we must still look to in considering the carrier's power of limiting his liability in the carriage of passengers. In considering the effect of these English cases in determining the common-law liability of railway companies in the carriage of passengers, this circumstance, however, has to be kept in mind, that in regard to the carriage of goods there had sprung up a *tractus rerum judicatarum* by which the judges considered themselves bound, to which there is nothing corresponding in regard to the conveyance of passengers.) In his Commentaries (i. 474) Mr. Bell says, "There seems to be only one point to which legitimately notices of public carriers can be admitted, viz. the regulation of the consideration for risk. (The learned author had just been referring to the unwarrantable responsibility sought to be thrown on carriers in the conveyance of articles of small bulk and great value.) "Saving always the power of making an express contract, the effect of a mere notice ought justly to be restricted to this point, as to which alone it is competent for a carrier to refuse employment" (Com. i. 474). Taking Mr. Bell's view, notice alone would not be sufficient to restrict liability in the carriage of passengers, because in that case no such questions occur as to special risk in the case of articles of small bulk and large value.<sup>2</sup>

In the English decisions we find fluctuations of opinion in regard to the effect of notices and the principle upon which they receive effect. Not unnaturally, for it is not difficult to discern amid the mass of decisions, more or less discordant, the influence of two antagonistic doctrines. One theory is that of special contract, the other that of special acceptance; that is to say, that these notices operated as a limitation of the public profession of the carrier. The special-acceptance doctrine has been stated with admirable skill and illustrated with ample learning by Chief-Justice Erle in *M'Manus v. Lancashire and Yorkshire Railway Company* (28 L. J. R. (Ex.) 353). The theory of special contract has been stated with admirable skill and illustrated with ample learning by Mr.

<sup>1</sup> Not entirely, however, *e.g.* the Railway and Canal Traffic Act of 1854 applies only in the case of a company working its own line.

<sup>2</sup> It may be argued that such a question may arise as to the carriage of passengers. After the recent case of *Philips v. London and North-Western Railway Company*, in which £16,000 damages were awarded, it may be asked, is there any article of greater value in proportion to its bulk than a fashionable London physician?

Justice (now Lord) Blackburn in the opinion before referred to, *Peek v. North Staffordshire Railway Company* (32 L. J. R. 253). It was not difficult, if one took the trouble, to illustrate either theory with ample learning, because there are in the decisions ample materials for illustrating both. Against the theory of special acceptance—the theory that a carrier by giving notice could limit his public profession of a carrier—it was urged with great force, why, if this is so, is it necessary that the notice should be brought home to the knowledge of the party? This was decided so far back as the year 1817, in the case of *Kerr v. Willan* (6 Mau. and S. 150). In a passage in Smith's *Leading Cases*, published in 1837, it is said, "If this notice was not communicated to the employer, it was of course ineffectual." On the other hand, it was urged with equal force that although the Courts sometimes chose to adhere to the name of special contract, they in point of fact gave effect to the doctrine of special acceptance. The case of *Walker v. York and North Midland Railway Company*, before referred to, was cited by Chief-Justice Erle in his opinion in *M'Manus* as a case in point. In *Walker's* case, said his Lordship, "the carrier limited his responsibility by special acceptance. The judgment was that he was protected, and though the judgment placed the protection on the ground of a special contract being presumed, the contract implied by the Court was rather a fiction of law for the purpose of doing right to the carrier without clashing with the last case [*Wyld v. Pickford*] than a matter of fact. . . . The plaintiff, so far from agreeing to the terms of the notice, claimed to treat it as null and void; the judge ruled that if the carrier gives a notice, and the customer dissents from the notice, and the carrier does not acquiesce in the dissent, the sending of goods by the customer is ground for which a jury may infer the customer's assent to a special contract in terms of the notice, and so the verdict was for the defendants; and the Court in upholding it does really affirm that a special acceptance of the carrier may bind the customer, but in the circuitous mode that a jury may infer a contract by the customer contrary to his expressed dissent."

The criticism of these learned judges on these opposing theories is clear and cannot be refuted. But it is criticism merely. If a carrier at his own hand can limit his public profession of a carrier and get rid of his common-law liabilities, the imposition by the common law of these liabilities as an incident to the privileges which the carrier is allowed is of no avail; and if he can so limit his liabilities, why has it been held necessary to bring knowledge of the limitation home to the person dealing with the carrier? And if it is necessary to bring home knowledge of the limitation to the person dealing with the carrier, we cannot help asking, why is it necessary? The only answer is that knowledge is indispensable to assent, and that assent is necessary to a limitation of these liabilities.



There are three leading cases regarding conditions in passengers' tickets, *Zunz v. South-Eastern Railway Company*, *Henderson v. Stevenson*, and *Burke v. South-Eastern Railway Company*; but our space compels us to delay our comments upon these till next month.

(*To be continued.*)

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## UNANIMITY OF JURIES.

(*From the "Central Law Journal."*)

It has been contended that it would be useless at this late day to attempt to reform the jury system; that if it is not perfect, it would be difficult to find its equivalent. To say that we are behind England in the progress of legal reform would be untrue, but even in that country a majority vote is held sufficient to sustain a verdict under certain circumstances. By statute 17 and 18 Vict. c. 59, in civil bill cases, where juries are unable to agree after a deliberation of six hours, the verdict of nine may be taken as of the whole. In fact, in every civilized country on the Continent in civil cases there is no jury, and in penal cases no unanimity is required, a specified majority of jurors establishing a verdict (Lieber's Civil Liberty and Self-Government). Many advocates of such a system will be found in this country. They say that it is often impossible to get a jury in civil cases capable of rendering a verdict consistent with the law and facts in a case; the jurors of our State Courts, being drawn frequently from the lower classes of society, are incompetent to perform their functions by reason of profound ignorance, utter lack of principle, entire disregard of truth. Their sympathies are won by the eloquence of the pleader, their prejudices aroused by the nature of the cause, and, even if they are honest in their convictions, an appeal to reason, a clear statement of the law, have no weight in altering preconceived but erroneous notions of right and justice. Hangers-on about a court-house, dead-beats, and loafers who generally compose our juries are not likely to understand the law as laid down by the Court, and in many instances the facts as elicited by the testimony. Lacking intelligence, they are incapable of arriving at reasonable conclusions. Without principle, they are unable to appreciate the distinctions between the right and wrong of a case. As non-freeholders, they have no sympathy with the rights of property. It is sufficient to know that a corporation is sued to render a verdict against it; and in an action for damages, by reason of alleged injuries, the only question which seems worthy of consideration is how much the plaintiff is entitled to, as it is taken for granted in the beginning that he ought to get something.

A writer on this subject lays down three propositions which he

endeavours to controvert, but they are the strongest evidences against his cause, the object of which is to maintain the unanimity principle (7 Amer. Law Reg. O. S. 314):—

1. It is often impossible to convince twelve men of the truth or falsity of a cause.

2. All analogy, social and political, approves of the majority system.

3. It enables one man by "holding out" to nullify the vote of the other eleven.

By a sweeping statement each of these propositions is negatived without alleging any intelligent reasons, and the conclusion is reached that a unanimous verdict is the best, because it implies deliberation, because it is the most correct, and because it is the most respected. The conclusions are pretty safe as far as they go, but it must be admitted that they fail to prove his case. It is true that the unanimous verdict of twelve men may imply deliberation, but there is little reason to doubt that the vote of eleven men, or of a less number, may also imply deliberation. Nay, much more so, because those cases wherein juries are unable to come to any agreement, and are consequently discharged, appear to have been more thoroughly "deliberated" than any other. It would seem that deliberation was not compatible with the doctrine of unanimity, for it has frequently happened that the longer jurors have deliberated upon a case the less likely they were to agree on a verdict. In one case (*People v. Goodwin*, 18 Johns. 188) a jury was discharged after deliberating so long (seventeen hours) as to exclude all reasonable expectation of ever arriving at a verdict "unless compelled to do so by famine and exhaustion." In another (*Com. v. Bowden*, 9 Mass. 494) the jury had "been confined together during part of a day and a whole night, and returned into Court and informed the judge that they had not agreed upon a verdict, and that it was not probable that they ever could agree." One of the jurors was withdrawn and the panel discharged, and the prisoner tried again by another jury during the same term, and convicted, and the question came up on motion in arrest of judgment. And in another (*Com. v. Purchase*, 2 Pick. 521), on a capital trial, the jury was discharged after a deliberation of eighteen hours, it appearing to the Court that there existed a difference of opinion among them upon the evidence, which any further deliberation would have no tendency to remove. There was, however, a method of securing unanimity by deliberation which was not mentioned in the article alluded to, and for which some analogy is furnished, and that was the practice of carting the jury about the circuit as matter of indignity to them by way of punishment for not performing their duty, or the custom, said to have been in vogue in Ireland at one time, of carrying them in a covered waggon along with the judge of the circuit to give them more ample time to digest the case and come to an agreement, and the still more

ancient mode of taking the verdict of eleven jurors, if they agreed, and committing the "refractory juror" to prison (Forsyth's History of Trial by Jury). The statement that the verdict of twelve men is more correct than that of a less number is not denied; but it may equally be said that the vote of nine men is generally more correct than that of three, or of a majority than a minority. When the judges of our appellate courts render strong dissenting opinions in the minority, tribunals, by the way, where the unanimity principle has never prevailed, we take the opinions of the majority as more correct and better law. It may occasionally happen that the minority of a jury possess the greatest intelligence, but as a general rule the same reasons exist for supposing all things equal in the one case as in the other. As for the verdict of twelve men being more likely to command respect than that of a less number, it is submitted that if a majority vote were held sufficient to sustain a verdict, a man would stand as fully acquitted before the community under that verdict as though it were a unanimous vote, when a disagreement under the unanimity principle frequently sets him free. In addition to the above propositions, another reason may be urged in support of the majority theory.

4. The unanimity principle is the cause of frequent disagreements of juries and repeated trials for the same offence.

Many courts hold that in capital cases it is no sufficient ground for discharging a jury without the consent of the respondent, that the jury are unable to agree upon a verdict, and that if the jury is so discharged it is a bar to any further prosecution for the same offence (*Com. v. Clue*, 3 Rawle, 498; *State v. Ephraim*, 2 Dev. & Batt. 162; *Com. v. Cook*, 6 S. & R. 577; *Williams's case*, 2 Gratt. 567); while in others this doctrine is denied, and Mr. Justice Story in one case says, "The prisoner has not been convicted or acquitted, and may be again put upon his defence. We think in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, as the ends of public justice would otherwise be defeated" (*United States v. Perez*, 9 Wheat. 579; *People v. Goodwin*, *supra*; *People v. Green*, 13 Wend. 55; *Com. v. Bowden*, *supra*; *Com. v. Purchase*, 2 Pick. 521). In another where the jury, after having deliberated for sixteen hours, returned into Court and propounded to the Court a question, and having received instructions retired and again deliberated for seven hours, when they returned into Court and reported their inability to agree upon a verdict, the jury was discharged and the prisoner remanded for another trial. The prisoner was again put on trial and found guilty of murder in the first degree. Then his counsel filed a motion in arrest of judgment because "the Court put the defendant upon trial a second time after having, against his objection and without sufficient reason, discharged the jury empanelled and sworn to try

him upon the same indictment, and thus placed him a second time in jeopardy for the same offence." The motion was overruled, and on appeal the Court say: "If a verdict cannot be obtained upon one trial, another may be lawfully had, and the unavoidable delay which ensues is the fault of no one. For the better protection of the accused the law requires unanimity in the jury before a verdict can be rendered; but to allow, on the one hand, the ignorance, perversity, or even honest mistake of a single juror to paralyze the administration of justice and turn loose upon the community the most dangerous offenders, or on the other, to allow the Government to trifle with the constitutional safeguards of the accused, would equally subvert the foundation principles upon which the criminal code is administered" (*Dobbins v. State*, 14 Ohio St. 493).

Where a disagreement of the jury is equivalent to an acquittal, it may not be material that there be a unanimous verdict of acquittal, for the same object is accomplished without it. If it is not a bar to a further prosecution, is the prisoner not really tried twice for the same offence in violation of the constitutional doctrine prohibiting it? The authorities tell us that there must be both verdict and judgment shown in order that the plea of *autrefois acquit* or *autrefois convict* may be made available (4 Black Com. 335; *United States v. Haskell*, 4 Wash. 402; *United States v. Gilbert*, 2 Sumn. 19); but may it not be said that there is as much a trial in a criminal case where there is a disagreement of the jury as where there is not, with the difference that a verdict is rendered in the one case, and in the other there is none? There may be exceptions such as are instanced in some of the cases cited. As where one of the jurors manifested symptoms of insanity after the jury had been kept together three days and more than twenty-four hours without refreshment, and it was held that a discharge of the jury was no bar to a further prosecution (*United States v. Haskell, supra*); or where an indispensable witness for the prosecution being committed by the Court for contempt in refusing to give testimony, the jury was discharged and the cause postponed (*United States v. Coolidge*, 2 Gall. 364).

Cases of that kind may furnish reasonable grounds for discharging a jury and justifying a further prosecution, inasmuch as there has not been afforded a full and fair trial of the accused. If, on the other hand, the jury has been given ample time for deliberation, and that time seems to be left to the discretion of the Court, and they announce their inability to agree, however long they may remain out, it is difficult to distinguish the difference between those cases and such as are in keeping with the doctrine prohibiting a second trial for the same offence. What if a second trial should result in a disagreement and discharge of the jury? In fact, an indefinite number of trials might be had without result, and unless the "afforcement" plan was brought into requisition it might be impossible to acquit or convict the prisoner. Whether the con-

stitutional doctrine is violated or not, it is at any rate affirmed that under the unanimity principle the cause of justice is delayed by repeated trials, or criminals escape conviction altogether from constant disagreements of juries.

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## The Month.

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*Report of Special Committee of Edinburgh Chamber of Commerce on the Law as to Deviation in Connection with the Saving of Life and Property at Sea.*—The law as to deviation for the purpose of saving life and property at sea was authoritatively declared, for the first time in this country, by the English Supreme Court of Judicature in their judgment in the case of the *Olympias* on 20th April last. Your Committee was appointed to consider the bearings of the law so set forth, with power to take all necessary steps towards procuring such amendment of it as seemed to be called for. Your Committee have now to report their reasons for considering the law, as now declared, unworkable and impolitic, and for urging, as they do, the necessity of an immediate legislative readjustment of it.

The judgment itself virtually amounted to legislation on a matter vitally affecting the interests of British maritime commerce, but to legislation which had not passed through the usual ordeal of parliamentary or public discussion. In delivering the judgment of the Court, Lord Chief-Justice Cockburn said: "It is a remarkable fact that while the commerce and mercantile marine of Great Britain have been for many years the largest in the world, the question as to how far a deviation for the purpose of saving life or property is justifiable has never come before the tribunals in this country so as to be authoritatively determined. . . . The case before us, therefore, so far as our Courts are concerned, presents itself as one of first impression, on which we have to declare—practically, I may say, to make the law."

The general scope and result of the judgment is, that the saving of life and the saving of property must be treated as two distinct things, with different legal effects and consequences to the saving or assisting ship and her owners. A deviation is protected if legally construed to be for the purpose of saving life, but not protected if construed to be for the saving of property. The following cases of deviation are construed to be for the purpose of saving life, and are protected accordingly:—

1st. To communicate with a ship in distress. This is allowed on the ground that "the state of the vessel in distress may involve danger to life."



2nd. To save life by taking the persons in the distressed ship out of her.

3rd. To save life in and with the distressed ship, provided that this saving of life cannot be effected otherwise than by the concurrent saving of the distressed ship itself.

But, on the other hand, it is declared as law, that "if the lives of the persons on board the disabled ship can be saved without saving the ship, as by taking them off, any deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation."

These consequences may be here briefly stated: By the law of Marine Insurance an unauthorized deviation renders the insurances void from the time it begins, and they remain void however speedily or however safely the ship may return to her course. Further, by the ordinary law of merchant shipping an unauthorized deviation carries with it the shipowners' liability to the goods-owner in respect of loss which would otherwise be within the exception of the perils of the sea. An unjustifiable delay operates as a deviation; and in particular, the act of taking another vessel in tow (although in the direction of the towing ship's own course) is construed as a deviation, seeing that "it necessarily retards the progress of the towing vessel, and thereby prolongs the risk of the voyage."

The result, then, is, that unless express authority to deviate for the purpose of assisting or towing other vessels has been obtained from insurers and from shippers of goods, the law, as now declared, prevents shipowners, by ruinous penalties, from allowing their vessels to give any assistance to disabled ships in respect of the saving of property. It equally prevents them from doing anything towards averting or lessening the existing danger to the lives of the persons on board and in charge of these ships, if these persons, from a sense of duty or from the instincts of professional honour, refuse to desert their charge. The immediate abandonment of the disabled ships, if physically possible (however uncalled for in other respects), is the sole condition on which any assistance in the saving of life can be given. If the disabled ships are *not* abandoned, the persons on board must remain exposed to all the risks and dangers arising from the unrelieved helplessness of their vessels. If the disabled ships *are* abandoned, these ships become in their turn a source of danger to all other ships that may cross their track. The derelict vessels cannot show lights or signals, or follow any rules of navigation; at night, particularly, they are not likely to be observed in time; and they may be struck upon with possibly fatal results to the colliding ship and all on board of her.

That the Legislature could not have contemplated such a condition of the law seems evident from the provisions of the Merchant Shipping Acts (sections 458 and 459) as to salvage for life and property. By these provisions the pro-

perty saved is made liable to pay salvage for the saving of life; and the salvage in respect of life has a priority over all other salvage claims, insomuch that even the entire proceeds of the property saved may in some cases be awarded in payment of life salvage only. The object of these beneficent provisions of the statute law seems now, however, to be defeated by making the abandonment of disabled ships and their cargoes the sole condition on which life can be saved without liability to the penalties of unauthorized deviation. This enforced abandonment of ships and cargoes annuls the statutory right of the salvors of life to reward from the property, which necessarily ceases to be liable by ceasing to exist.

It would seem to be in conformity only with the consequence just stated that the Lord Chief-Justice sanctions deviation for the purpose of saving life, as being dictated "by a sense of duty, without expectation of reward." He remarks, however, "Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil which, though its fulfilment may have been attended with danger to life and property, remains unrewarded." These observations do not appear quite to meet the real circumstances. Whether the saving of property be a moral duty or not, no one can doubt that the needless destruction of property is very much the reverse of a moral duty; and nothing less than this is involved in the unnecessary removal of seamen from the ships at sea that have been intrusted to their charge.

The truth is, that if you are to do anything at all for the safety of the lives of the seamen in disabled ships, you cannot simply let the property alone. You must necessarily interfere with it, either for good or evil to its proprietors. If you procure the safety of the lives by assisting the ship and crew together into safety, your interference benefits the property. But if, when this course might have been taken, you physically remove the guardians of the property from their charge of it, your interference robs the property of its due, necessary, and existing protection, and thereby dooms it to destruction.

It would appear, then, that the distinction now made by the law between the saving of life and the saving of property is not one that can be practically carried out. The attempt to translate that distinction into actual procedure at sea could produce nothing but confusion and embarrassment. The facts to be dealt with are not in their own nature capable of being brought within the lines of that distinction; neither are the interests, motives, or actions of the persons engaged in connection with maritime commerce. This, your Committee believe, sufficiently accounts for the remarkable fact, referred to by the Lord Chief-Justice, that notwithstanding the immense extent of British commerce, no case was ever before presented for authoritative decision in any British Court on the lines of this distinction.

Your Committee submit that the true starting-point for dealing justly and reasonably with the whole matter is the acknowledged duty of attending to signals of distress exhibited at sea. All are agreed that this duty is a paramount one; but this means that the needed assistance is to be given, if it reasonably can be given. Therefore the giving of that reasonable assistance must be protected, as well as the mere ascertainment of the circumstances. Then, further, the particular form in which the assistance is to be rendered must necessarily vary according to the circumstances both of the distressed ship and of the assisting ship, so that there must be reasonable latitude in this respect also. All this follows strictly and necessarily from the original duty of communicating with the distressed ship; it is only the carrying out of the course of duty so entered upon. There is no stage in the process at which the original protection accorded by the law ought to terminate.

The real nature of such services is in no way altered by the circumstance that they may be followed by a salvage reward. That is only an accessory. If it be objected that the owners of goods on board the assisting ship have incurred some extra risk by the services, and yet do not participate in the reward, the remedy for that state of matters is not to disallow the services, nor to expose those who render them to ruinous penalties, but to provide that the reward itself should be fairly distributed, so that cargo-owners, if equitably entitled to a share, might receive that share. This could be regulated by the Court in fixing the amount of the salvage award. If, as anticipated by the Lord Chief-Justice, the amount awarded for salvage may now be increased in consideration of the shipowner's risk of liabilities to cargo-owners, this extra payment may as well be handed over directly to the cargo-owners, whose measure of risk it is presumed to be adequate to cover. To expose the shipowner to indefinite liabilities to cargo-owners in connection with salvage services is simply to prohibit these services altogether, because no extra percentage of salvage remuneration could possibly influence a reasonably prudent man to put himself in the position of being ruined.

But it is further said that shipowners may, if they think fit, protect themselves from the consequences of deviation by so bargaining with shippers and insurers. This, your Committee must observe, makes the possibility of salvage services being rendered to distressed ships depend on the terms of private contracts, and not on any considerations of public duty in reference to the saving of life and property. Unless a shipowner has made such a private bargain, he may about as well refuse to allow his ships to attend to any signals of distress at all as to attend to them without the right of rendering the assistance needed. The law, as now declared, forbids the exercise of the reasonable discretion actually necessary, and his attempts to do the best may only serve to entangle him in its meshes. The general body of shipowners can only act in such

matters under the sanctions of the public law; and the law ought to be reasonable and workable in itself without depending on private contracts for making it so.

In conclusion, your Committee must express their conviction that it is essential to the interests of British maritime commerce, and to those of all persons engaged in carrying it on, whether seamen, shipowners, merchants, or underwriters, that no impediments should be put in the way of saving both lives and property from the results of the hazards of the seas as far as can possibly be done. If the legal impediments now in question are not removed by prompt and wise legislation, the results both to life and property cannot fail to be altogether disastrous. The country would be unworthy of its commanding position in connection with maritime commerce if this duty is neglected or even long postponed. The Chamber may render important service by using its influence in calling attention to the evils complained of and in helping to secure that they shall be speedily remedied.

The Committee have requested their colleague, Mr. John War-rack of Leith, by whom this report has been drawn up, to sign it, and present it in their name.

*Legal Time.*—Many years ago the railway companies of Great Britain resolved that all the railway clocks should be regulated by "mean time" at Greenwich. This order was announced to the public, was acquiesced in by them; and as the departure and arrival of trains form such an important element in the day's proceedings, and as so many things in the day's calculations require to be regulated thereby, the new rule soon became, and remained, the rule, not merely in railway matters, but in all matters. So much so was this the case that one required to think for a little to consider whether there could be any question about the matter. There was a question, however, about the matter. The question was whether the legal time at any place was the Greenwich or railway time, or the local "mean time." The two times vary a good deal even in a space so limited in its degrees of longitude as Great Britain. Greenwich time differs from the local "mean time" from being seven minutes too fast at Lowestoft to being thirty-four minutes too slow at St. Kilda. During the recent General Election attention was not unnaturally called to the subject. An elector at Lowestoft coming to vote at five minutes before eight according to Greenwich time was not too early if the local "mean time" was to regulate. There is no polling station at St. Kilda, and probably the inhabitants have not heard of the result of the General Election yet. But if there was a polling station there, a voter who presented himself at 4.30 P.M. according to Greenwich time would be entitled to vote if the local "mean time" was to regulate. Suppose an election turned, as has happened, on a single vote, and one or two voters at a place one degree of west longitude presented themselves

one minute past 4 P.M. by Greenwich time, what would be the result?

It is only in Great Britain that Greenwich time rules even on railways. It has never been extended to Ireland. And in some matters even in this country the local "mean time" ruled. For example, the lighthouse-keepers were in the habit of lighting up their lamps and extinguishing them without paying the slightest regard to Greenwich time.

It was not upon any Act of Parliament, but only upon custom, that the adoption of Greenwich time rested. So far as we know there was only one reported decision upon the subject. In the case of *Curtis v. Marsh* (Nov. 24, 1858, 28 L. J. R. (Q. B.) 36) the question arose in this way. At the Winchester assizes Baron Watson came into Court on the day of trial precisely at ten o'clock, as the time appeared by the Town Hall clock, which, however, was regulated by Greenwich time, and was several minutes faster than other clocks in the town and than the real local "mean time." A case was called, no one appeared for the defendant, and the Judge, supposing the case to be undefended, observed that, under the Common Law Procedure Act, if the defendant in an ejectment (the action in question) did not appear, verdict should be for the plaintiff. A verdict for the plaintiff was accordingly entered. Two minutes after, according to the defendant's statement, five according to the Judge's note, the defendant's counsel appeared and contended that according to the clocks in the town he was still in time. The Judge, who was not aware that the clocks varied, or that the cause was a defended one, desired the plaintiff's counsel to consent to have the case tried. The plaintiff's attorney refused unless the defendant should find security for costs, which he was unable to do, and so the verdict stood. The case came before the Court of Exchequer, who held that the defendant should be let in to try the case. Chief Baron Pollock said, "The time by which a Court ought to go is the time of the town in which the Court sits, not Greenwich time." And in giving judgment he remarked: "The true time at any place is the 'mean time' (as astronomers say) at that place, not Greenwich time; and it is not competent to the authorities of a place to determine that the true time for legal purposes shall be the time at any other place. It becomes material for many purposes in law to ascertain the time at which an event happened, as a birth or a death, with reference to the right to an estate, or to the bonus or principal on a contract of life insurance. And it cannot be allowed that the true legal time is to be altered and the legal rights of parties affected by arbitrary regulations at particular places that Greenwich time shall be observed. It may be very convenient to have clocks so regulated with reference to railways, but that cannot affect the law on the subject."

This question turned up during the General Election, and there was not only a good deal of difference of opinion upon the subject, but there was a difference of practice. To settle the matter a short



Act has recently been passed, which enacts (sec. 1) that "whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred [*sic*] shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time, and in the case of Ireland, Dublin mean time.

"2. This Act may be cited as the Statute (Definition of Time) Act, 1880."

It is worthy of note that the above statutory definition applies only to expressions in *any Act of Parliament, deed, or other legal instrument*.

*Elections in England and America.*—In our May number we pointed out that there had been a good many irregularities committed by officials at the elections then just over. Since then the election judges have had occasion to point out that a good many irregularities, but of a different kind, had been committed by electors. These election petitions are not nearly so amusing as they might be. There is a sameness about them. There is a want of imagination in the people engaged in corrupt practices, who never seem to be able to strike out an entirely novel path. When you read the report of the evidence in an election petition you sometimes wonder if you are not reading an old newspaper. You have the same old incidents and the same old characters. There is your ancient friend who takes a sudden interest in the little children of a working man whom he had never spoken-to in his life before, wins their mother's heart by admiring them and their father's by giving them half-a-crown apiece. Then there is our equally ancient friend, the Benevolent Gentleman, who purchases a large property near a small borough, and builds a splendid house, the erection of which gives employment to a large number of people and makes him extremely popular in the district. He has amassed a considerable fortune, and he thinks it would be a very good thing to spend a part of it in charity. But as he is comparatively a stranger in these parts he does not know whom to be charitable to. So he employs an agent to distribute his charities. Very soon after a General Election makes its appearance on the scene, and oddly enough the Benevolent Gentleman is asked to stand as a candidate. He does so, and is elected. But unfortunately the agent whom he had employed to distribute his charities he had retained as agent in electioneering. It is not surprising that during the heat and hurry of an election the charity and the electioneering had got awkwardly mixed up. So the Benevolent Gentleman loses his seat, protesting by the mouth of himself and his counsel that his motives in the distribution had been purely and entirely benevolent.

Our election irregularities are very trifling affairs, and have little attraction of novelty. They do these things better in America. "Westward the course of empire takes its way." To vote early and to vote often is the whole duty of electoral man.

Our malpractices are of a "one-horse" kind, and they bear the same relation to those committed in the land where "the Caucasian is played out" and the Caucus is played in that a cascade in a gentleman's pleasure-grounds bears to the Falls of Niagara. The Supreme Court of Kansas a short time ago had occasion to determine a question of election law which is novel in the history of America, and which certainly is without a parallel in the history of this country. At an election in the county of Harper, in the State of Kansas, there were between 800 and 900 people on the roll, and 2947 people voted. This was a poll much above the average. In these circumstances the persons on whom devolved the duty of declaring the poll refused to do so. A *mandamus* was applied for to compel them to make the return. The defence was that the nominal vote being so contrary to what could possibly have been the true vote, and it being perfectly certain that the vast majority of the votes cast were manufactured votes, it would be a farce to make any return. The Court refused to take any steps to compel the "canvassing board," as it was called, to make a return. In this country the proceedings in such circumstances would be different. A petition would be presented to the House of Commons, who would immediately compel the returning officer to make a return. Then on that being made, a petition would be presented to the election tribunal. If the false votes could be separated from the true ones, this would be done; and the genuine voters would not be deprived of their constitutional privilege because of the fraud of others. If, after all the rejection of false votes that could be made, the number of votes recorded exceeded the number of voters on the register, the election would be declared void.

Probably there may have been a barrier in the way of following this course—at least so far as a scrutiny is concerned—in Kansas. We do not know, but we think it is very likely, that the election laws in force at the election in question in Kansas provide no machinery for tracing a vote. The present Ballot Act when first introduced into the House of Commons contained no provision for detecting even the vote of a personator. The personator might be punished, but the vote remained.

"*The Lord High Admiral of the Orkneys.*"—The newspapers report the following incident which occurred at a regatta which was held the other day at Lerwick. The learned and genial Sheriff of the county would seem to be equally at home whether he presides on the Bench in his Court-House or, with his accustomed gallantry, sinks his naval rank and acts as steersman to a fair crew: "A novel rowing race took place at the annual regatta in Shetland. Shetland women are noted for their ability in managing a boat, and Sheriff and Admiral Thoms, who was in Lerwick at the time, offered to act as coxswain to four strapping 'Trondra lassies' in a contest between them and a boat manned by men from the revenue

cutter *Eagle*. The match was keenly contested, but ultimately was won easily by the Shetland lassies by more than four minutes on a half-mile course. The Shetlanders, who used two oars each, pulled very gracefully."

*Female Lawyers.*—Not every lady and gentleman who has this season applauded Miss Terry's "Portia" is aware that about the date when the "Merchant of Venice" may be supposed to have exhibited his gaberdine on the Rialto there actually existed great female lawyers in the neighbouring city of Bologna. Professor Calderini, who held the Chair of Jurisprudence in that University in 1360, and Professor Novella, who occupied it in 1366, were not only celebrated for their legal lore and skill, but, if we may trust their portraits, for exceedingly beautiful women, with noble Greek profiles, dressed in a style which Miss Terry might have copied without disadvantage. If women hereafter should again obtain entrance into the legal profession, it is not at all improbable that we may see something more of the keenness of feminine wits engaged in disentangling the knots of the law. Two ladies in Ireland, according to the *Times'* Dublin correspondent, have just been conducting their own most intricate cases in a manner which excited the surprise of the Master of the Rolls, who even observed that he was "astonished that the ladies had been able to put their case on paper so intelligently and clearly without legal advice." If other ladies should follow the example of the Misses Fogarty, what a falling off must ensue in the solicitors' bills! They lost their case, it is true, but seemingly could not have won it under any guidance; and at all events they have escaped that great aggravation of the misery of defeat in a court of law—the lawyer's costs.—*Pall Mall Gazette*.

*Modern Legislation.*—A writer in the *St. James's Gazette* thus burlesques the Wild Birds' Protection Bill now before Parliament, which proposes that the first offence shall be punished by a "simple reprimand:"—

"97. Provided that if the person so convicted and reprimanded as aforesaid shall, by laughing, whistling dancing, cocking snooks, turning cartwheels, or otherwise signify his contempt for such two justices and their reprimand, it shall be lawful for the Court to require the attendance of the mother, grandmother, aunt, or other female relative intrusted with the charge of the person so convicted, and to make inquiries of them as to the way in which such person has been brought up, and as to where he is expected to go to; and in case such inquiries should not be answered to the satisfaction of the Court, to administer to the mother, grandmother, or other person so failing to make

Defendant not to  
'cheek' justices.

Power to justices to  
summon defendant's  
mother, grand-  
mother, etc., and  
to make certain in-  
quiries of them.

Mother, grand-  
mother, etc., to be  
reprimanded or  
suitably admonished.

satisfactory answer, such other reprimand or admonition as to the justices shall seem suitable.

“98. Any person who has been reprimanded or admonished as last aforesaid by any justices may appeal to the Appeal to quarter sessions. next general or quarter sessions of the peace which shall be held for the city, county, town, or place wherein such reprimand or admonition shall have been administered; provided that such person enter into a recognizance within three days next after receiving such reprimand with two sufficient sureties conditioned to try the appeal, and to be forthcoming to abide the judgment and determination of the Court at such general or quarter sessions, and to pay such costs as shall be by such Court awarded.

“99. For carrying out the provisions of this Act the following Interpretation clause. words and expressions shall, if not inconsistent with the context, be thus interpreted:—

“‘Laughing’ shall include grimacing, ‘mugging,’ or any voluntary ‘Laughing.’ contortion of the countenance which shall appear, and, in the opinion of the justices, be intended to appear, disrespectful to the Court.

“‘Dancing’ shall include performing the ‘frog hornpipe,’ and ‘Dancing.’ shall apply to all such movements of the lower limbs as are either unaccompanied by change of place, or, in the opinion of the justices, unnecessary to locomotion.

“‘Cocking snooks’ shall mean ‘taking a sight,’ or the pressing ‘Cocking snooks.’ or placing of the thumb or thumbs of either hand or both hands over or against the nose and the stretching forth or extending of the fingers of such hand or hands, and shall further include any gesture indicative or commonly accepted or received as indicative of contempt.

“‘Turning cartwheels’ shall include standing on the hands or ‘Turning cartwheels.’ head, whether with or without the support of a wall or other perpendicular or horizontal support for the feet.

“100. Nothing in this Act contained shall affect the power of proceeding by summary castigation, or take away any other remedy commonly resorted to by adults against juvenile offenders.”  
Proceedings by summary castigation not to be affected.

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## The Scottish Law Magazine and Sheriff Court Reporter.

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### SHERIFF COURT OF PERTH.

Sheriffs BARCLAY, LEE, and MACDONALD.

PERTH COUNTY ROAD TRUSTEES v. HOWIE.

*Highway—Removal of erections on sides of roads.*—Recently an action was raised by the County Road Trustees of the county of Perth and Allan

M'Pherson, Esq. of Blairgowrie, one of the said trustees, and chairman of the Committee for the Blairgowrie or Eastern District of the county, against James Howie, builder and joiner, Rattray, to ordain the house which is being erected by the defender in Rattray at the side of the highway running through Rattray, and leading from Blairgowrie to Alyth, to be pulled down or removed at the expense of the defender, at least in so far as the same is within the distance of 25 feet from the centre of the said highway thereat, and exceeds within the said distance the height of 7 feet. The defender intimated his willingness to take down the building and go back to the distance of 25 feet from the centre of the roadway, but declined to do as the pursuers wished, to place his building back a distance of 25 feet from a point midway between the edge of the footpath next defender's house and the edge of the carriage-way on the other side of the road, or at least to the line of his dwelling-houses to the east of the one in question. It was also pled for the defender that the statutory distance of 25 feet fell to be measured from the centre of the "hard road" or carriage-way, and therefore the defender was not bound to remove his building to the point which the pursuers had required him to do. After hearing parties' agents, Sheriff Barclay has issued the following interlocutor :—

*"Perth, 17th November 1879.*—Having heard parties' procurators and made avizandum with the process and debate, Finds it admitted by the defender that the defender's building in course of erection, and now the subject of complaint, is within 25 feet from the centre of the roadway, but that he, the defender, states that he is willing to take down the building and go back to the distance of 25 feet from the centre of the roadway. But the parties differ as to what under the highway statutes is to be held the centre of the roadway : Finds under a sound construction of the law the centre of the road is to be held a point midway or in the centre of the highway, including the footpath : With this finding orders the case to be enrolled for further procedure.

"HUGH BARCLAY.

*"Note.*—This is a novel question, and attended somewhat with difficulty. In the first place, it is necessary to discover the legal breadth of the highway, and in the next place, whether that breadth is inclusive or exclusive of the footpath on both or on either side. By the old Scotch Act 1617, c. 8, sec. 8, it is declared that '20 feet should be the breadth of highways to market towns, and those of larger breadth were to remain so.' By the statute 11 Geo. III. c. 53, sec. 1, it is declared 'that roads should be 20 feet in width exclusive of bank and ditch, and a justice of the peace might order the roads to be further widened, but the breadth not to exceed 30 feet, and satisfaction was to be made to the owner for ground taken beyond 20 feet.' By the recent General Turnpike Act, 1 and 2 William IV. c. 43, sec. 61, the trustees were authorized to widen and extend all roads 'so that the same shall in all places be 20 feet in width of clear passable road exclusive of the bank, ditch, and fence on either side thereof, 20 feet being hereby declared to be the least legal breadth of a turnpike road.' By the Roads and Bridges (Scotland) Act of 1878 the General Turnpike Act and the General County Service Road Act are both repealed by section 122. By section 58 of the recent Act new or additional roads and bridges may be constructed by the highway board, but no provision has been made for the width thereof. As to footpaths, unfortunately nothing is said in the principal Act. In numerous sections which are reserved and re-enacted from the General Highway Act the words occur, 'such road and the footpaths thereof' (sections 80, 87, 89, 96, 105). But in section 96 a penalty is enacted for 'any person to ride, etc., on any footpath or causeway on or by the side of any turnpike road made or set apart for the use or accommodation of foot-passengers.' In section 90 there is a penalty provided for any encroachment 'on the surface of any turnpike road.' By section 82 of the General Turnpike Act, now abolished, it was made lawful for the trustees of every turnpike road 'to make and keep in repair footpaths on the



same, and the trustees were required to make and maintain the footpath on all such roads within two miles of any city, borough, or town, the population of which, within a circle described, within a radius of half a mile round the market cross or centre of the market-place thereof, shall amount to two thousand souls ;' and, by the same section, trustees were compellable to perform this last duty, and several instances are on record of this obligation being enforced. Perhaps, unfortunately, the 82nd section has been omitted to be re-enacted. It seems purposely to have been omitted, as the sections taken from the old Act, and scheduled consecutively, run from 81 to 83, consequently thus omitting the intermediate section. In this way it seems no longer compellable on the trustees under the new Act to make or maintain footpaths on any road, even where it is the approach to a market town.

"The *locus* of the building complained of is admittedly within the distance of a town which could have formerly compelled the trustees to make and maintain a footpath. A footpath does exist at that place on the side of the road next to the defender's building ; but if it be no longer obligatory on the trustees to maintain the footpath, the whole breadth, being the property of the trustees, may at any time be made carriage-roadway for ordinary traffic.

"This action is founded on the 91st section of the General Road Act, imported in the Roads and Bridges (Scotland) Act, 1878, and re-enacted. It is distinctly enacted that 'no building above 7 feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosure or plantation shall be made within the distance from the centre of any turnpike road.' If the law be positive and clear it is not necessary to search for the reasons thereof. One reason, however, is apparent that the highways may be well aired, and so that the soil be kept dry, and that in the progress of a country the trustees might desire to widen a roadway, and if houses were built close to its margin this would be rendered impossible. No better reason can be given than that observed by Lord Chief-Justice Tenterden in the case, 1832, *Rex v. Wright* (3 B. and A. 681). His Lordship said : 'When I see a space of 50 or 60 feet through which a road passes between enclosure set out under an Act of Parliament, I am strongly of opinion, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy the whole may not have been kept in repair. If it were once held that only the middle part which carriages ordinarily run upon was the road, you might by degrees enclose up to it so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually in use as the road it could not be kept sound.'

"It is remarkable that in the English Act 3 George IV.—the sections corresponding with the 91st section of the General Turnpike Act—the distance of erections prohibited is 30 feet within three miles of any market town, and 25 feet beyond that distance, and by section 124 the centre of the road is held to be 'the middle of the hard road maintained by the trustees for six months before the offence.' This distinction between the Road Law in England and Scotland on this head is not very easily to be reconciled ; but it will be observed that the distance of the prohibited erection in England is increased by 5 feet within three miles of a market town, and beyond that distance the measurement is exactly as in Scotland. Thus, beyond the 3 miles there was not likely to be any footpaths, and therefore it was less necessary to include the footpath in the measurement.

"In like manner the 105th section of the General Turnpike Act, ingrafted in the Highways Act, enacts a penalty for a person ploughing and omitting 'to make side ridges along the sides of the road of the breadth of 12 feet at least.' The corresponding section of the English Act, 3 Geo. III. c. 118, prohibits a plough or harrow from being turned within 30 feet if within 3 miles of a market town, or beyond that distance of 25 feet from the or centre of the road.

"Upon the whole the Sheriff-Substitute is of opinion that the road, including the footpath, being the property of the road trustees, the centre of the road should be held midway of the whole of their property, including the footpath. Supposing that the footpath was to be removed to the other side opposite the defender's house, and made of the same or greater breadth, then, if the defender were right that the footpath was to be excluded in the measurement, it is clear that his building would be close upon the very margin of the carriage-road, and therefore somewhat dangerous to travellers. H. B."

On appeal the Sheriff (Lee) ordered a proof on certain points as to the history of the road and the alleged consent of the road trustees to the erection of the defender's house. After the proof had been led the following interlocutor was pronounced:—

"*Perth, 3rd June 1880.*—Having heard parties' procurators and made avizandum with process and debate, Finds as matters of fact—

"1st. The defender has property on the south side of the road between Blairgowrie and Alyth, in or near Rattray.

"2nd. The said road was sometime regulated under the County of Perth Statute Service Act, 1811.

"3rd. Under the said Act (sec. 75) the trustees were authorized to make footpaths along the sides of the highways.

"4th. The trustees under the said Act did on or about the year 1836 form a footpath on the south of said highway, on its side adjacent to the pursuer's property, and subsequently maintained the same.

"5th. By the 78th section of the said Act it was enacted that no house or building should be erected nearer the centre of the highway than 20 feet, or the space occupied by footpaths on the sides thereof where such building exceeds 6 feet, unless sanctioned by the trustees at the stated district meeting.

"6th. On 29th November 1879 the Roads and Bridges (Scotland) Act, 1878, was adopted by the county of Perth.

"7th. The Highways Act, 1878 (sec. 3), adopted all existing roads, and thereby superseded the County Act, 1811.

"8th. By the 91st section of the General Turnpike Act (2 Will. IV. c. 43) no houses or other buildings were permitted to be erected above 7 feet high, without the consent of the trustees *obtained in writing*, within the distance of 25 feet from the centre of the road.

"9th. The said 91st section of last-recited Act by section 123 was incorporated with the Act 1878.

"10th. The defender in the year 1878 commenced the erection of a house on the south side of the said highway which was intended to exceed, and did before the defender was interdicted actually exceed, 7 feet in height.

"11th. The defender has not proved authority by the trustees under the Act 1811, or the Act 1878, sanctioning the erection of the house contrary to the prohibitions of the statutes.

"12th. Under a sound construction of the Acts the centre of the highway is the middle of the road so far as the same is the property of the trustees, including the footpaths made and maintained by them.

"Therefore before judgment remits to \_\_\_\_\_, on due notice to the parties, to measure the highway opposite to the defender's house from side to side so far as it is the property of the road trustees, including the footpath, and to measure from the centre of the highway so ascertained, and to report how far the defender's house is within that limit, and to what line it ought to be taken back, as also to measure the highway exclusive of the footpath, and in the same manner to state the results. HUGH BARCLAY.

"*Note.*—The Sheriff-Substitute refers to the observations made by him contained in the notes annexed to his interlocutor of 17th November.

"The only points which were argued at the debate was, first, the defender maintained he had the consent of the trustees to erect the house on the line adopted. He did not pretend that such consent had been given by the trustees

at a stated meeting whilst the highway was regulated by the County Act, 1811. The conversation with Mr. Scott, one of the clerks, can never, though it had been much more satisfactorily established, be held to supply a *written consent* of the trustees under the Act 1878. The conditions implied under both these Acts prove the strong feeling of the Legislature that the roadway should be kept open and clear from all obstructions.

"The other point argued was, that as there were at some parts of the highway a footpath on both sides and at others only on one side, and perhaps on certain portions on neither side, the line of houses would become very irregular by strictly adopting the rule. The answer to this is that the road trustees have only the management and care of the roads. The line and regularity of the buildings on their sides is a matter for the proprietors and feuars. The statutes liberally provide that they have the power, when it seems consistent with the preservation of the road, to permit a reasonable deviation from the strict letter of the Act, and which a body of gentlemen acting for the public interest would not refrain from exercising when it can be done justly without injuring the object of their trust, the highway. In this case, unfortunately, the deviation from the statutory distance has the effect of destroying the line of surrounding buildings instead of preserving the line. H. B."

On appeal the Sheriff (J. H. A. Macdonald) on 21st June affirmed the interlocutor of 3rd June. The parties, instead of having an inspection, by joint minute agreed to measurements and to the extent of the encroachment, whereon decree was pronounced to remove the encroachment, and costs were awarded.

*Act.*—M'Leish.—*Alt.*—W. & T. Soutar.

## SHERIFF COURT OF LINLITHGOW.

Sheriff MUNRO.

CLARK v. RUSSELL and FLINN.

*Gift of Mine—Removal.*—This is an action raised in the Sheriff Court of Linlithgow at the instance of Thomas Clark, M.D., Benhar Cottage, Whitburn, against Alexander Russell, labourer or miner in the parish of Bathgate, and Michael Flinn, engine-keeper or miner, Blackburn. The object of the action is to have the defenders summarily removed and ejected from the Inch Colliery on the lands of Westerinch and Whitehill, and from the said lands of Westerinch and Whitehill (other than the dwelling-house occupied by the said Alexander Russell in Whitehill), in the parish of Bathgate and county of Linlithgow.

The state of matters as set forth in the record is somewhat remarkable. The estate of Westerinch and Whitehill belongs, it is admitted by both parties, to the brother of the pursuer, Alexander Clark, who has been for some years back residing in Copenhagen. The pursuer states that in 1874 when his brother was on a visit to this country he gave him liberty to work the minerals on the estate as if they were his own, and to let the same, and generally to act in connection with them as he might think proper. The pursuer then sunk a mine on the estate, and erected a steam-engine and other machinery. In 1879 pursuer allowed the defender Russell, who is a relation of his, to work the minerals on his own behalf, so that he might be enabled to maintain his parents and support himself, and gave him the use of the machinery; this being simply on a verbal arrangement and clear understanding that it was a mere favour to the defender Russell, and was only to continue during the pursuer's pleasure. Ultimately having become dissatisfied with the manner in which the defender Russell was behaving himself and the carrying on of the operations at Westerinch, the pursuer determined to withdraw the liberty he had given and put an end to the arrangement; and his agent accordingly intimated this to Russell, but no notice was taken of the

intimation: hence this action. The above is the gist of the pursuer's averments on record.

On the contrary, the defender Russell says that in the beginning of 1879 the pursuer on behalf of and as representing his brother, Alexander Clark, the proprietor thereof, handed the colliery over to him (Russell) as a gift, along with the machinery, the only condition being that he would be kind to and look after his mother, who is related to the pursuer, and is subject to severe illnesses. The pursuer in July 1879, at the Bathgate Small Debt Court, in an action brought against him at the instance of James Johnston for the expense of some repairs on the said machinery, swore that such a gift had been made, and that the machinery was not his but the defender Russell's, and was in consequence assolvied from the conclusions of the action; and a decree was subsequently obtained against Russell for that sum. (This averment is specially denied by the pursuer.) In the beginning of November 1879 Russell, being aware that he might require to be away from the colliery for a year or more, gave Michael Flinn, then engineman at the pit, a sub-lease of the pit for two years. This sub-lease was in writing, and dated 6th November 1879. Flinn was to pay over the lordship of 6d. per ton to the defender's mother for her support; and he entered into possession accordingly.

The defender Flinn's statements refer mainly to the sub-lease and to his entering into possession of the mine under it.

As the case is one of some interest we give the pleas in law of the parties in full.

The pursuer pleads: (1) That the defender Russell, having entered to the mine or coal-pit, and been allowed to work the coals on the distinct understanding that his occupation was only to be during the pleasure of the pursuer, and that the pursuer would be entitled to resume possession at any time, the pursuer is entitled to decree of removing and ejection in terms of the prayer of the petition. (2) The whole subjects in question being heritable could not be gifted verbally, and no written conveyance being produced or alleged, decree should be granted as craved. (3) The defender Flinn having no right or title to be on the lands of Westerinch and Whitehill to work and carry off the coals, decree of removing and ejection should be granted against him in terms of the prayer of the petition. (4) Even on the assumption that Russell had any right or title to grant a sub-lease to Flinn, the pretended sub-lease not being probative nor containing any definite ish, not being properly stamped, and being otherwise deficient in the essentials of a sub-lease, the pursuer is entitled to decree as prayed for. (5) Allegations having been made by both defenders by which proof becomes necessary in this action of removing, the defenders are not entitled to be heard until they find caution for violent profits. (6) Failing the defenders finding caution for violent profits, the pursuer is entitled to decree of removing and ejection as prayed for. (7) Generally in the circumstances the pursuer is entitled to decree of ejection in terms of the prayer of the petition with expenses against the defenders.

The defender Russell pleads: (1) The pursuer not being heritable proprietor of the lands and minerals of Westerinch and Whitehill, nor the possessor of any other right or title thereto, he is not entitled to sue the present action of removing and ejection. (2) A written title in favour of the pursuer being essential, and he having not only admitted but averred that he has no such title, this defence is thereby instantly verified, and the action ought to be dismissed *de plano*. (3) The pursuer having made a gift of any right which he himself had, as well as granted a lease on behalf of his brother, the proprietor, to the defender Russell to work said minerals, along with the engine, plant, and whole machinery in connection therewith, without any reservation to recall such gift or grant, he has now no right whatever thereto. (4) The pursuer's right, whatever it may have once been, is now barred by homologation and *rei interventu*. (5) In the whole circumstances the present action falls to be dismissed with expenses to the defender.

The defender Flinn pleads: (1) *Ex confesso*, the pursuer having no

written title, has in law no title at all to sue. (2) The defender, the said Michael Flinn, having taken a sub-let of said minerals and use of engine and machinery in good faith, as above mentioned, and at the date of the sub-lease entered upon and since remained in the possession thereof, cannot be removed therefrom until the expiry of his sub-lease in November 1880. (3) In the circumstances this action falls to be dismissed with expenses to the defender, the said Michael Flinn.

After the record was closed the Sheriff-Substitute issued an interlocutor allowing proof to all parties, and declining to make an order for violent profits. The pursuer appealed. A reclaiming petition and answers were ordered and lodged; after considering which the Sheriff-Depute pronounced the following interlocutor :—

*“Edinburgh, 12th July 1880.—The Sheriff having considered the process, Recalls the interlocutor of the Sheriff-Substitute of 4th June 1880: Finds that in the year 1879 the pursuer allowed the defender to work the mineral on the lands of Westerinch and Whitehill, and at the same time gave him the use of the steam-boiler, steam-engine, and other machinery necessary in working the minerals, including coal-hutches: Finds that the defender Russell continued to work out the coal till 6th November 1879, and thereafter ceased to work out said coal, and handed over the mine, steam-engine, and other machinery to the other defender, Flinn, who is now in possession thereof: Finds that the defender Russell has not averred relevantly any title to maintain possession, and that the defender Flinn has no such title: Finds that they are precarious possessors, and that the pursuer, as the person from whom Russell derived his right of possession, is entitled summarily to eject both the defenders: Therefore decerns in terms of the prayer of the petition: Finds the pursuer entitled to expenses: Allows an account thereof to be lodged, and remits the same to the auditor to tax and to report.*

*“GEORGE MUNRO.*

*“Note.—The defenders cannot challenge the title of the pursuer to remove them from the property, because their only title of possession is derived from the pursuer.*

*“The relationship among the parties explains the anomalous character of the arrangement set forth upon the record. The pursuer obtains from his own brother, the proprietor of the estate, a right to work the minerals and to let them, and it is not in the mouth of the defenders to say that the pursuer has got no written title to act as proprietor. The defender Russell is permitted to work the minerals and get the use of the machinery in the field. He states that this was a gift to him to last during the lives of his parents, while the pursuer avers that the allowance or permission was only to be during his pleasure. If anything turned upon this discrepancy the Sheriff would have affirmed the interlocutor if parole evidence were competent; but nothing does turn upon it. According to the statement of Russell himself, he was allowed to work the mine, no longer does so, but has quitted the possession and handed over the whole property, under what is called a sub-lease, to the defender Flinn. Russell had no power to grant such sub-lease. He was not a tenant, and taking his own account of his possession, all he got was a privilege personal to himself. Further, the alleged gift as averred by him could only be proved by the writ or oath of the pursuer, and not by parole evidence, as allowed by the interlocutor of the Sheriff-Substitute. G. M.”*

The case is, we believe, to be appealed to the Court of Session.

*Act.—Dodds.—Alt.—Miller.*

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#### ERRATUM.

Page 447, line 23, for “wages” read “taxes.”



# THE JOURNAL OF JURISPRUDENCE.

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## THE ABOLITION OF HYPOTHEC.

It is not without a sigh of regret that the Scottish lawyer sees the final abolition of so old a friend as the law of hypothec in *prædia rustica*. Derived in principle from the Roman law, it was considerably extended in its application to the relations of landlords and tenants in Scotland; and although for many years it has been the object of a most severe reforming crusade, it has held its place most gallantly, and down to the last there may be said to have been a real difference of opinion with respect to the public policy of this form of tacit security. The most glaring injustice towards the trade creditors, to which attention was called by the case of *Barns* in 1863, was removed by the Act of 1867; and the Select Committee of the House of Lords, which considered a Bill in 1869, declined to sanction the principle of total abolition, and defended the privilege of the landlord with very considerable ingenuity. The Lords, however, had quite underrated the force of public opinion in Scotland upon the subject; and the history of the long series of rival Bills since the year 1869 has shown a gradual approach to something like unanimity on both sides of at least the Lower House. The Lords have recently shown themselves perfectly capable of resisting even unanimous votes of the Commons, but in the case of Hypothec last session they thought it wiser to put their prejudices in their pockets. And so we have at last reached the stage of total abolition, so far at least as the question of hypothec is a practical one for the tenant farmer. Two important questions remain: (1) To what extent does hypothec exist? (2) What has been put in its place where it has been abolished?

The Act of 1880 (43 Vict. c. 12) is very improperly termed "An Act to abolish the Landlord's Right of Hypothec for Rent in Scotland." It never professed to touch the landlord's hypothec in urban subjects. It may be that, as the Select Committee prophesied in 1869, the principle of this Act will be sufficient ultimately to

destroy the urban hypothec too. Very likely. It is difficult to draw a clear and solid distinction between the two great branches of hypothec. As regards dwelling-houses which are not used as places of business, the argument from false credit and resulting injury to trade is not of course so strong as in the case of farms. But it is quite as strong in the case of buildings used for trade and manufacture; and as regards dwelling-houses, no one now believes in the ridiculously shallow humanitarian argument that because it is desirable people should have houses to shelter them, therefore the landlords of these houses should be tempted to give up possession of them in consideration of receiving privileges which are unjust towards the other creditors of the tenant. It is most undesirable that people should live in houses of which they cannot pay the rent. The history of sequestrations shows how often this insane desire to get into a house beyond his means contributes to the ruin of a tradesman. Whatever may be the future consequences of the Act, this is no reason why the title should inaccurately describe its present effect. But besides that the recent Act does not touch the urban hypothec, it does not abolish all other hypothec. Its operation is confined to the "rent of land, including the rent of any buildings thereon, exceeding two acres in extent, let for agriculture or pasture." Though the grammar of this is not everything that could be desired, still it is clear that the right of hypothec remains over all subjects less than two acres in extent. The Act speaks of buildings two acres in extent, but this is only slipshod grammar. It was scarcely necessary to explain that the rent includes the rent of buildings. Indeed it is dangerous. If the buildings are used in connection with the same agricultural or pastoral purposes as the land, and there is only one rent proper, then it was the law, and everybody knows, that the hypothec was available for the rent of the agricultural or pastoral subject. In abolishing it for the land-rent, you abolish it for the house-rent, because there were not two rents, but one. On the other hand, if there are on agricultural or pastoral land to which this Act applies, houses not used in connection with the land, it is not the intention of the Act to destroy the right of hypothec for the rent of such houses, although it might be argued from its loose and ungrammatical terms that it does. Unless intended to include a separate house-rent, the words are entirely superfluous; and as they are not intended in any case to include a separate house-rent (for it never happens that a farm-rent is split up into parts for the different portions of the farm), they ought to have been struck out. The first limitation of the Act is by the superficial extent of the subject. There must be a very considerable number of subjects in Scotland which are let for agriculture or pasture, and which are less than two acres in extent. In many cases these will be adjuncts of cottages, the land being occupied not for purposes of trade, but in order to feed the cow or to fill the garden of the cottage. It does not appear why, as matter of strict

principle, such small subjects should have been excluded from the operation of the Act. Probably the Act meant to destroy hypothec only in so far as it was a hindrance to the business of farming. In connection with the subject of small holdings it must be kept in view that there is a large class of small grass-farms in the neighbourhood of large towns, from which it has been generally understood that hypothec is excluded as inconsistent with the nature of their cultivation; a daily crop being produced by rotation. Some of these farms are large; and it is not probable that many of them are less than two acres in extent (Bell's Com. ii. 29, 30). The second limitation of the Act is that the land must be let for agriculture or pasture. This excludes not merely buildings, whether used as dwelling-houses apart from farming or for purposes of trade, but also such valuable leaseholds as minerals, woods, fisheries, and game. It is not likely that many difficulties will rise as to the meaning of agriculture and pasture. In such cases as *Campbell v. Anstruther* (9 Jur. 163), and *M'Clymonts v. Cathcart* (20 Jur. 557), the Court were asked to decide whether a farm was a corn or a grass farm; and the principle applied was that the farm took its character from the source from which the profits were chiefly derived. But corn and pasture may be easily distinguished from most other things, although they may be combined with many. A pasture-park, for instance, might conceivably be let with a colliery for the convenient grazing of the horses employed in the work. In such a case there would probably be one rent, and the hypothec of the landlord would extend over the whole subject. But what of gardens and orchards? The learned Mr. Hunter says (i. 257), "Leases of gardens are not unfrequent, as the nature of the cultivation ensures a fair return; but leases of orchards are little known in Scotland on account of the very precarious nature of the crop." Things have considerably changed since Mr. Hunter wrote, even in 1860. There is a great deal of first-class garden-farming in Scotland, and fruit is raised for the market in large quantities. Nursery-gardens alone cover a large space; and if Mr. Gladstone's advice given at West Calder be followed by the Scottish farmers, we may expect in the future much larger crops of fruit and vegetables. It is clear that to all subjects of that class the Act does not extend. They are not let for pasture, and it would be doing violence to the ordinary use of language to say that they are used for agricultural purposes. But then it is doubtful whether in the case of horticultural subjects the Act was required. It is certain that the Act of 1867 was not applied to them. The point was considered, but not decided in the case of *Begbie v. Boyd* (16 Sh. 232, 10 Jur. 153). The landlord there asserted a right to sequester the young trees, shrubs, bushes, stools, plants, bulbous roots, flowers, seeds, hand-glasses, hotbed-frames, covers, working implements, etc., in a nursery. The case was decided on the form of a security given over the ground, but Lord Corehouse said, "Shrubs of that description

situated in nursery-ground, such as rose-stools and the like used for slips every year, and bulbous roots laid past for several seasons probably and then used, as well as the common stocking of a nursery, are not in the same situation as crops growing year by year, nor are they *invecta et illata*. I have great doubts that the hypothec of a landlord extends over that." Lord Gillies also expressed a doubt, but Lord President Hope said, "I should rather think the landlord's hypothec does extend over such things, else *where is his security?*" This last is too much a landlord's argument to be popular at the present day. It seems, however, as Mr. Hunter thinks (Landlord and Tenant, ii. 373), to be the logically consistent view of the matter. Some of the articles mentioned in *Begbie's* case resemble the implements of husbandry, and would therefore, on the analogy of arable farms, be free from hypothec. But the plants reared for sale in a nursery, or the annual crop of vegetables or fruit in a market-garden or orchard, it is impossible to distinguish in principle from a corn or hay crop. They may, however, be distinguished in fact, and considering how odious tacit securities are to the law, it would probably be the sounder legal view that if the right of hypothec has not already been affirmed by decision to extend to horticultural subjects, it ought not now to be so extended. Mr. Hunter indeed says that "in practice it is deemed to be undoubted," and goes on to distinguish between the stock, by which he means trees and bushes planted originally for fruit, not removable by the tenant and remaining the property of the landlord, and the crop, by which he means trees and plants in course of propagation for sale. In the latter case only would hypothec exist, although, perhaps, the landlord's right of property in fruit-trees, if planted by the tenant, cannot be said to be clear. Shrubs in pots, Mr. Hunter admits, cannot be called crop, but he subjects them to hypothec as *invecta et illata*; and he states it as an open question whether the hypothec would also extend to those parts of greenhouses and other erections removable by the tenant, and also to implements and furniture. He admits that it is uncertain whether a nursery-garden is to be treated in this question as an agricultural or a manufacturing subject. If a perfectly uniform and universal custom and understanding in support of hypothec on horticultural subjects were proved to exist, this would no doubt influence the decision of the Court on the general question, but it is idle to speculate on such a subject. No light is to be got from the decisions in the Law of Fixtures as applicable to nursery-gardens. In *Gordon's* case (Hume, Dec. 188) a distinction was taken between plants in a trade nursery and those in the private nursery of an estate. The first would go to the executor, the second to the heir. This is quite intelligible on the principles of destination rather than of fixture; and it probably follows, or if it does not follow, it seems to have been decided in *Syme v. Harvey* that plants planted in a trade nursery by the tenant, and also glass

frames and heating apparatuses would be removable by him, and not fixtures. But such decisions go a very short way towards establishing the right of hypothec. It is only after the things in dispute have been decided *not* to be the property of the landlord that the question of hypothec can arise. It must therefore be pronounced still doubtful whether hypothec extends to horticultural subjects. If it does, it has not been abolished by the Act of 1880.

The abolition of hypothec, so far as it extends, will come into operation at Martinmas 1881, but it will not affect the rights of parties under existing leases, writings, or bargains. It is important to notice that hypothec survives during the currency of the lease, not merely where a formal agreement has been entered into, but wherever parties have become bound to each other under the old law, which annexed hypothec as a legal incident to the relation of landlord and tenant. This is the general principle of respecting vested interests on which Parliament always proceeds, unless it is prepared to offer compensation. Of course the benefit of the new law is thus to a certain extent delayed. But it by no means follows, as was pointed out in the recent discussions on a very similar question under the Ground Game Bill, that the relations of landlord and tenant will continue as defined by the old law until the expiry of existing contracts. Voluntary agreements have a tendency to modify themselves according to the general law; and as new leases are constantly being granted, it is almost certain that the privilege of hypothec, condemned as it is by legislation, will not last long on farms when their neighbours, or some of them, have got rid of it. Unless a change were made, it would probably damage the farm.

The next question is, What has been substituted for hypothec where it has been abolished? (1) The landlord is to have the same rights and remedies against his tenant when six months' rent is due and unpaid as he has now when twelve months' rent is due and unpaid. What, then, is the right of a landlord under the old law when a year's rent is in arrear? We do not of course speak of such remedies as are open to the landlord as an ordinary creditor in a debt due. He may use diligence if he has a registered obligation, or he may sue an action of mails and duties. But the remedies peculiar to a landlord for non-payment of rent are those given by the Act of Sederunt of 1756. Where rent is in arrear for one year only, the remedy is under the 5th section of the Act of Sederunt, and consists of an action in the Sheriff Court to ordain the tenant within a limited time to find caution for arrears and also for the rent of the next five years, or until the end of the lease if that be a shorter period. If the tenant does not find this caution, he may be ejected as if his lease were at an end and legal warning had been given. The Act of Sederunt has been interpreted with some strictness against tenants. The arrear may consist of portions of the rents of several crops, and the landlord is not bound to accept



any partial payment, although sufficient to reduce the arrear due at decree to less than the year's rent. Debts of the landlord and public burdens paid by the tenant without authority are not given credit for. It would even appear from the case of *Marshall v. Read* (Hume, 569) that partial payments recovered by force of legal diligence are not sufficient to purge the irritancy of a lease incurred under another section of the Act of Sederunt; and the same rule would probably be applied under sec. 5. This doctrine has not been recently considered, but it was not repudiated in *Sutherland v. Mackenzie* (26 Jur. 466). It is, however, much too broadly stated by Mr. Hunter (ii. 125), where he says, "The criterion is formed by the fact of a full year's rent being due at the commencement of the process. And therefore it has been held that the removing of a tenant on the Act of Sederunt as in arrear of rent is not prevented by recovery of the arrear in the course of legal diligence." This was not held either in the case of *Low v. Knowles* (Morr. 13873), to which he refers, or anywhere else. The true state of the authorities is this: that the fact of a year's rent being due when action is raised will not justify decree, if pending the action full payment is made voluntarily or operated by diligence, but that the landlord is not bound to be content with part payment or partial recovery, and hence decree may be pronounced, although after crediting the partial payment much less than a year's rent is due. This at least is one construction of the cases of *Low v. Knowles*, and *Campbell v. Robertson* (Morr. 13867), in one of which the tenant paid up the whole arrears, and in the other the whole arrears were recovered from the cautioner in a sequestration for rent. Hence in both cases the tenant was assoilzied. It may be argued that the effect of *Low v. Knowles* is that the landlord, though not bound to accept part payment if he prefers to remove, is not entitled to remove if he does take a payment which reduces the amount due below the year's rent. The brevity of the reports leaves this important matter doubtful, but the probability is that the landlord is entitled to recover his money, as well as use his remedy, unless complete purgation takes place in the action. The Court in *Low v. Knowles* are certainly reported as saying, contrary to the text of Mr. Hunter's work, that the year's rent must be due at the date of decree, but this was by way of correcting the erroneous idea on which the Lord Ordinary had proceeded, that it was sufficient if the year's rent was due when the action was commenced. On any other view the decree of ejection would operate as a discharge of rent, which is absurd. On the other hand, it is clear from *Urquhart v. Mackenzie* (3 Sh. 84) and other cases that for certain counter-claims, such as a claim for improvements executed by the tenant under a stipulation in the lease, although not constituted by decree, the landlord is bound to give credit. This will resolve very much into the question whether or not the tenant was entitled to retain the rent

in respect of a counter-claim. If he is so entitled, it is not strictly correct to say the rent is due in the sense of being payable. Recent decisions of the Court have tended very much to enlarge the operation of the principle of retention or compensation or counter-claim. The old rule, not admitting illiquid claims to compensation, is being qualified by a more equitable rule which makes the non-performance of a part of a mutual contract a good defence to instant decree for performance of the other part, even where the non-performance is not such as to disentitle the defaulter from suing, but merely founds a cross claim of damages or compensation. Such, in rough outline, are the remedies competent to the landlord under the law prior to 1880, when one year's rent falls into arrear. Mr. Hunter says that the Act of Sederunt is confined to agricultural subjects, but by this he probably does not mean to exclude pastoral farms. The Act of 1880 does not include pasture in agriculture, but the Act of Sederunt is in practice applied to both classes of subjects. The remedies were stringent enough under the previous law, considering that the landlord was always able to resort to the diligence and action of an ordinary creditor. The landlord is no doubt bound by his lease to go on with an unsatisfactory tenant, and may have a very strong interest to put an end to the tenancy or else to get security for the liabilities accruing in the future. Other creditors are in the position of giving the credit usual in their trade. And the landlord is not only interested in the rent, he is interested in the producer of rent, the soil, which is apt to suffer in the hands of a man not punctual with his rent. But whether or not the landlord can make out a case for an exceptional remedy in case of failure to meet the year's rent, it is a very different matter to give this remedy on failure to pay the half-year's rent. Many capital tenants may have to ask time to settle the rent at one term, although on the whole year's transactions they will have no difficulty in squaring the account. It is too much to expose them twice in the year to this demand for caution with the alternative of ejection. It is probable, and the Act of 1880 proceeds on the supposition, that the decree would be for immediate ejection, and not at one of the legal terms. This point is not at all clear, but it is not affected by the doctrine of *Lyon v. Irvine* (1 Rettie, 512), which was not only a case of conventional irritancy, but in which the terms of the lease put instant removal out of the question. The Act of 1880, however, imposes certain conditions on the exercise of the privilege, which for the first time it gives to Scottish landlords on one term's rent going into arrear. Fourteen days' notice must be given of the action. The caution required is not for five years, but only for the arrears and for one year's rent more. The tenant ejected does not forfeit the rights of an outgoing tenant, *i.e.* as these rights stood at the date of ejection or at the last preceding term. When the ejection takes place between these terms the tenant is to get payment of or credit for his expenditure since the

last term on the labour, seed, and manure applied to any crop which is not an away-going crop. In the latter his rights, as already said, are those of an outgoing tenant. Also, when he is ejected between terms, he is to pay only a proportion of the term's rent corresponding to the period of his occupation. On the other hand, if the way-going crop is immature at the date of ejection, the tenant will not be entitled to carry it away at maturity until the landlord has got payment of the rent for the remainder of the broken year, the rent being calculated according to the average rent of the whole farm. These conditions being observed, it will be seen that what the tenant loses by ejection is the benefit of his lease, but the account between him and his landlord otherwise is made up on tolerably equitable terms. The penalty is considerably mitigated by the conditions, but it is still too heavy for arrear at a single half-yearly term. The landlord may properly ask some security if more than a year's rent is due and unpaid, because he is as it were under a continuing obligation to give credit to the tenant. But the tenant ought to have a year to pay his rent in without disturbance of tenure. It is not easy for a tenant who is even a little short to find caution; and though the amount of caution is reduced to the rent of one year, it is most undesirable to put the tenant, who may be embarrassed only for the moment, under the necessity of disclosing his condition and asking help.

But a second remedy is substituted for hypothec by the Act of 1880. When twelve months' rent is due and unpaid, the landlord is now to have the same remedy as was formerly competent to him when two years' rent was due and unpaid. This is the remedy of irritancy under sec. 4 of the Act of Sederunt of 1856. Here the tenant has no opportunity of finding caution. He may pay up the whole arrears during the action. If he does so, this is what is oddly called purgation, and he is secure. If he cannot raise the money before decree, the lease is irritated and the tenant removed. The same conditions are by the Act of 1880 annexed to the exercise of this right as in the case of failure to pay six months' rent.

Such are the blessings conferred on tenant farmers along with the abolition of hypothec. It can hardly be said their position is improved directly. Like the rest of the public, they were interested in the removal of an unjust law which was injuring agriculture and had much to do with the swollen rents of the last twenty years. But this has been dearly purchased. The Act is practically a confession by landlords that hypothec enabled them to keep on insolvent tenants. The farmers have now got a little schooling as well as their landlords; and some of them will be tempted to exclaim, "*Timeo Danaos et dona ferentes.*"

## NOTES IN THE INNER HOUSE.

QUESTIONS as to goods or luggage deposited with railway companies for safe custody have hitherto been of much more frequent occurrence in English than in Scottish tribunals, but in *Handon v. The Caledonian Railway Company* (18th June 1880, 17 S. L. R. 664) there were peculiarities which render the decision worthy of remark. Handon had come from America, and on arrival in Glasgow he deposited, with other articles, at the Buchanan Street Station, one of the large trunks frequently used by American travellers. This trunk, owing presumably to its size, when given to the company's officials was not taken by them into the left-luggage office, but was left outside on the platform at a place frequently used for bulky articles, and in view of the left-luggage clerk. The pursuer on depositing his trunk got a ticket, for which he, as is usual, paid 2d. That ticket bore that "the company only receive the within-mentioned articles upon the conditions expressed on the back of this ticket," and on the back were limitations of their liability to the sum of £5, unless special notice of additional value were given and extra payment made therefor.

The trunk in question disappeared, and Handon raised an action for £60 as its value. The company resisted and endeavoured to turn the whole case on the conditions of their left-luggage tickets. There had been no special notice and no extra payment for additional value, while the conditions being reasonable, and every precaution having been taken, the company did not consider themselves further liable. The Court, however, adhering to the opinions and judgments of the Sheriff and Sheriff-Substitute, refused to adopt this view. Much stress was laid on the English case of *Harris v. The Great Western Railway Company* (May 30, 1876, L. R. 1 Q. B. Div. 515), where the goods were deposited in a vestibule, a place, it was argued for the company, less safe than in the present instance. On the back of the ticket in *Handon's* case were these words, "The Caledonian Railway Company hereby give notice that they will only warehouse articles subject to the following conditions." The Lord President, apropos of this, said, "That, I think, means not only that they will not warehouse articles except upon these conditions, but also that they will warehouse articles upon these conditions, and therefore that there is an obligation on the company when articles are handed over to them to receive them" upon the enumerated conditions. It was upon this consideration truly that the decision turned. By their own act the company made themselves bound to take the articles deposited, and further, by their own conditions undertook to "warehouse" them. Here they failed to "warehouse" properly; the evidence showed that they did not fulfil this obligation, for the articles belonging to Handon taken inside the office were safe, and

this trunk left outside was lost. In the view taken by the Court it did not signify whether the trunk was inside at one time and was afterwards put outside or not, and equally the case of *Harris*, to which we have already referred, was relegated to another class of decisions altogether, by the circumstance that while here there was no "warehousing" at all, in *Harris'* case the vestibule was truly part of the cloak-room, or at the worst not a part of the open platform. Lord Shand in giving his judgment indicated, though without any absolute expression of opinion, that he thought it improbable that arriving late at night from America these passengers would have noticed the printed conditions on the ticket. If this were so, an argument of force might have been founded upon the want of due notice of the conditions; but the Court did not require to decide such a point, for even taking it as given in favour of the railway company, the considerations we have already mentioned as to their failure to fulfil their contract to "warehouse" the goods were amply sufficient for the decision of the action. We cannot but think that in cases of this class no railway company has any good cause for complaint that a stringent interpretation is put upon their contracts, looking to the large sums they receive for taking charge of luggage and goods by this warehousing. The Sheriff-Substitute in *Handon's* case incidentally mentioned that at Buchanan Street Station alone the company during slack times were in the habit of drawing for luggage deposited in the luggage office as much as £5 to £6 a day.

The 22nd section of the Sheriff Court Act, 1853, which limits the right of appeal to cases exceeding £25 in value, came under the notice of the Court in *Dobbie v. Thomson and Others* (22nd June 1880, 17 S. L. R. 677). A landlord had sequestrated his tenant, and sold under judicial authority articles to the extent of £38 odd. Of this sum £21 odd was applied duly in extinction of the expenses of process, and the interlocutor then appointed "the balance of £17, 6s. 1d. to be consigned in the hands of the clerk of Court, subject to future orders." The Court decided that a litigation as to this consigned money, though in the form of claims by certain creditors under the statute for the benefit of workmen, was a new and separate process, and that there was no room for the application of such rules as those laid down in *Aberdeen v. Wilson* (10 Macph. 971), because there, although the amount, originally exceeding £25, had *pendente processu* been reduced below that sum, the action was one and the same throughout, the very opposite being the case here. The later Sheriff Court Act of 1876 (39 and 40 Vict. c. 70, sec. 20) formed the subject of question in *Alder v. Clark and Others* (8th July 1880, 17 S. L. R. 740). The appellant alone appeared when the case was called, and moved that his appeal be sustained in respect of no appearance for the respondent. The Court, somewhat putting aside the decision in *Stewart v. Stewart* (9 Macph. 740), held that the appellant must show cause why the judgment should be reversed.



Lord Gifford observed that "the judgments appealed from are good standing judgments, and must remain so until cause is shown for reversing them. I do not see that we are bound to put a man who holds a good judgment, or two good judgments as in this case, to the penalty of losing his case unless he employ counsel."

In *Fraser v. The Liquidators of the City of Glasgow Bank* (18th June 1880, 17 S. L. R. 661) an attempt was made by a former agent of the bank who had retired some years before the failure to enforce against the liquidators payment of a retiring allowance granted him by the directors in consideration of past services and failing health. The Court adhered to the decision of Lord Young, and assoilzied the defenders. Lord Shand, after pointing out that Mr. Fraser had at the time he was an agent no permanent position, and might have been dismissed and so lost his salary at any time, went on to say that his position as regards the retiring allowance was that of one who "was to get his salary without giving any services in return for it. The arrangement, even as he stated it, is one by which he gave no consideration whatever. What the bank gave him, therefore, was of the nature of a gratuitous gift." Taking this view, the Court refused to enforce the payment, though even on the general question the judges indicated that such an undertaking by directors to pay an annual sum must be taken as given with the inherent condition of solvency and a going business.

There have been of late years a good many contradictory judgments in the Sheriff Courts all over Scotland upon the question whether a parish minister is liable in payment of school-rates leviable under sec. 44 of the Education Act, 1872 (35 and 36 Vict. c. 62), on his glebe and manse. In 1879 this point came before Sheriff-Substitute Bell at Cupar, and he decided in favour of Mr. Hogg the minister; but on appeal the Sheriff (Crichton) reversed this interlocutor and gave decree against the minister. Mr. Hogg thereupon raised in the Court of Session an action (*Hogg v. Parochial Board of Auchtermuchty*, 17 S. L. R. 687) for reduction of the decree, and declarator of exemption. It was in the first place held as a matter of form of process that it was competent to raise this question of exemption in the form adopted by the minister, and the Second Division further decided against any right of exemption. The discussion turned mainly on the interpretation of sec. 44 of the Education Act. That section enacts that "the school-rate shall be in all cases levied and collected in the same manner as poor's assessment, and the laws applicable for the time to the imposition, collection, and recovery of poor's assessment shall be applicable to the school-rate." There is of course no doubt that at common law the Established Church clergy have hitherto been exempt from any poor-rates for their manses and glebes, and Mr. Hogg contended that by the section just quoted his school-rate was placed *pari passu* with his poor-rate, and that from it all he was exempt. Truly it will be seen the meaning of the word "imposition" is the crucial

point of the matter, and that word Lord Young, in delivering the opinion of the Court, considers as referring "to the rating authority and to their proceedings in allocating or laying the rate on those who are subject to it, which though a formal and simple, is a necessary preliminary to collection and recovery." The same learned judge in his exhaustive opinion pointed out that when in 1872 the Education Act was passed the school-rate could not always as now be collected along with the poor-rate. At that time there were variations in the incidence of the poor-rate due to local circumstances and customs, while *ab initio* the school-rate was imposed on one and the same body of persons everywhere, and to meet the exceptional incidence of the poor-rate, the school board were in such cases empowered to assess and levy directly their own rate. The class nature of the privilege of exemption from poor-rate was also pointed out, and especial attention drawn to its *personal* character, as illustrated by the liability of a tenant where a manse or glebe is let, and the liability of feuars or long leaseholders to assessment for poor-rate where glebe-lands have been thus alienated. Lord Young further observed that the case was "interesting chiefly as referring to the solitary survival, at least so far as I know, of a class privilege of exemption from taxation. In 1845, when the poor law was amended, it escaped the destruction which has in one way or other overtaken all its kind and species. It did so by what is generally, and probably rightly, regarded as a blunder in the Act of that year, viz. a declaration, not seemingly favourable to parish ministers although it proved to be so, to the effect that they should be liable to be assessed on their stipends. This being an express partial repeal of their privilege of exemption, was held to imply that it should in other respects continue to subsist, and they have enjoyed the benefit of the implication ever since. Such privileges, which are necessarily enjoyed at the cost of others, are in their nature invidious, and are regarded with disfavour in these days, and the wonder is, not that all but this have disappeared, but that this has been so long lived." The Court generally may be said to have proceeded upon the view (1) of the clause of the Act; (2) of the necessity for a strict interpretation where class exemption was sought to be extended.

An interesting though somewhat special point has been raised in a case at the instance of the rentallers of the Theatre Royal, Edinburgh, against the lessees; but we do not propose at present to enter into the matter, as it has been appealed to the House of Lords.

The powers conferred on the Board of Trade by the Acts 17 and 18 Vict. c. 104, 35 and 36 Vict. c. 73, and 39 and 40 Vict. c. 80, extend to their issue of special instructions to their surveyors as to what will and will not be regarded by the Board as a sufficiency of the hull in passenger ships, and entitle the surveyor to grant the declaration on this point required by the Act as antecedent to

the issue of a certificate by the Board. In *Denny Brothers and Another v. Hannah and The Board of Trade* (17 S. L. R. 694) the shipbuilders contended vainly that such instructions to surveyors were *ultra vires* of the Board, and that Hannah was bound to give them the declaration as he would have done if he had been left to his own judgment. The outlets of the soil and scupper pipes had been attached to the hull by iron castings, and this, it appeared, was contrary to the instructions issued by the Board to their ship-surveyors. Not only did Denny Brothers, however, fail in this, but they were further told that their proper remedy if they felt aggrieved would have been by way of application under the Merchant Shipping Act, 1876, sec. 14, to a Court of Survey or a scientific referee.

The Court of Chancery in England, under the 1st section of the Act 22 and 23 Vict. c. 63, ordered a case to be settled before the Judge in Chambers for the opinion of the Court of Session in Scotland as to the nature of a certain heritable bond. The case as settled was authenticated by the chief clerk of the Court of Chancery, but without any order remitting it here and desiring the opinion of the Scottish Court. When the matter came up (*Guthrie and Others, Petitioners*, 14th July 1880, 17 S. L. R. 765) the Court (First Division) refused to consider the case, since the provision of the Act had not been complied with, that provision being that "it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, . . . and upon such case being approved of by such Court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and *shall pronounce an order remitting the same, together with the case, to the Court in such other part of her Majesty's dominions,*" etc. In yet another petition (*Kennedy, Petitioner*, 13th July 1880, 17 S. L. R. 760) the First Division refused under any circumstances to authorize the transmission to England of the public registers of births, marriages, and deaths, and this although certified extracts did not appear to be admissible as evidence, the entries being long prior to 1854, the date at which by the Act (17 and 18 Vict. c. 80, sec. 58) they were made so admissible. A similar application as regarded an extracted process and other registered documents was also refused, the Lord President remarking that even were it merely an application for a diligence to recover them it was very doubtful whether that would be granted.

There have been during the last few months several decisions in bankruptcy cases to which it may be interesting to refer. Thus in *Bertram v. Guild* (July 9, 1880, 17 S. L. R. 754), Bertram, a tenant on the estates of Lewis Potter, of City of Glasgow Bank notoriety, claimed a preferable ranking against Guild, the trustee in the sequestration. This claim was founded upon somewhat peculiar circumstances, for when Potter became bankrupt he was paying

his tenant annually a sum of more than £230 per annum in compensation for lands resumed for feuing purposes, the whole rental of £290 being extinguished. The tenant claimed in all close upon £1200 as representing the amount due from Martinmas 1878 in respect of these resumptions; and further, he claimed a preference on what he maintained was a real right in the lease, and a *quasi* real right to the compensation owing to the trustee having adopted the feu-contracts and drawn the large feu-duties, which were a *surrogatum* for the lands resumed. On the other hand, there was a denial of adoption of the lease by the trustee, who further said he could not in a case of lease in any view become liable beyond the amount of rent he drew, which here was *nil*. To entitle him to be ranked preferably, said the Lord President, a creditor "must have either a privileged debt or a security. Now this claimant has neither. It is not said that this is a privileged debt, and it would be difficult to say what sort of security he can be said to hold." His Lordship went on to say there might be a right of security so far as retention of rent went, but above that there was no preferable claim. In *Lindsay v. Adamson and Ronaldson* (July 2, 1880, 17 S. L. R. 707) the question was whether cheques granted by the bankrupt were struck at by the Act 1696, having been granted within sixty days of bankruptcy. They were so granted in course of management by the bankrupt of a vessel of which he was ship's-husband. The freight was assigned to him by the defenders for collection on the arrival of the vessel at Leith, and it was so collected, the proceeds being paid by the bankrupt into his bank account, and cheques being sent to the defenders in retirement of bills accepted by them from the bankrupt against the freight. The action was raised by the bankrupt's trustee, but he was unsuccessful, as the Court held that what had taken place was within the bankrupt's powers as ship's-husband; moreover, that the bankrupt could effectually grant these cheques in the course of carrying out an agreement entered into long before the sixty days preceding bankruptcy; and further, that an alteration in the destination of the vessel from London to Leith had not altered the position of matters, there being no special restriction of the right of the defenders to receive payment of the freight on her arrival at London port only. The bankrupt was merely the hand or agent of the defenders, and the form in which he paid them, namely, by paying in the freight to and then drawing cheques on his own account did not alter the relations of the parties. In *Urquhart (Dempster's trustee), Petitioner* (3rd July 1880, 17 S. L. R. 713), the trustee in a sequestration under 54 Geo. III. c. 137, petitioned for exoneration and discharge, but sought also authority under sec. 54 to charge the expenses of the proceedings for discharge against the interest accrued upon unclaimed dividends, at least so far as not met by the cash balance in hand. The petitioner proposed thereafter to deposit, under the 1856 Act, the unclaimed dividends and the balance of

the accrued interest in bank, and asked the Court to empower him to do this, and also to fix a date at which the sequestration should terminate. The petition had been duly approved by a meeting of creditors. After a remit to the Lord Ordinary and a report by the Accountant in Bankruptcy the prayer of the petition was granted, and one year fixed as a reasonable period (sec. 76) for the termination of the sequestration, thus giving creditors time to apply under sec. 153 of the 1856 Act for the dividends which remained unclaimed.

On July 8th two cases were decided by the Second Division in which, though under widely different circumstances, an attempt was made to obtain preferential security by creditors for their debt over bankrupt estates. This in the case of *The Heritable Securities Investment Association (Limited) v. Wingate & Company* was attempted as follows: The Heritable Company lent Wingate & Company in 1875 £55,000, taking from the borrowers (1) *ex facie* absolute disposition of their shipbuilding-yard and heritable property; (2) their personal bond, payable partly by instalments over ten years. There was also a lease by the Heritable Company to the borrowers of the yard, etc., at £4800 per annum, while the rent of the property on the valuation roll was but £1800. There was also a declaration that the property was held in security for the advance, and for all penalties and interests thereon, with a power of redemption by Wingate & Company on their repaying the sum advanced with all interest, and also *all other sums of money that shall be due* to the Association at the time of redemption, and interest, etc., thereon; while, further, for all sums paid in name of rent Wingate & Company were to be entitled to receive credit. In 1876 Wingate & Company suspended payment, and in 1877 a new firm was started under the old name, and taking over all the obligations of the old firm. This new firm entered in January 1879 into a contract with the Dundalk Harbour Commissioners to build them a dredging machine, but in May 1879 they also suspended payment, having in 1877 borrowed £10,000 more from the Heritable Company. The Heritable Association accordingly petitioned to sequester all the property in the shipbuilding-yard for £4800 as rent due them, and both the trustee and the Dundalk Harbour Commissioners resisted the application. The pursuers claimed as landlord's hypothec over all the *invecta et illata* of the yard, while the defenders maintained that the £4800 was not *bona-fide* rent, but truly was interest and instalments of principal, and was an illegal preference both at common law and under the Act 1696, c. 5. The Sheriff only sustained the pursuers' claim to the extent of £1800 as true rent. The Court, however, went farther than this, and altogether repelled the claims of the pursuers, taking the view that the transaction was a simulate one altogether. "I cannot," said Lord Gifford, "make a lease for the parties if they have not made a real one for themselves. I cannot



make a rent which the parties do not admit. And therefore I put them in the former position, which is that of heritable creditors who have not granted a lease at all . . . I think that this is an attempt to get a new form of security which would be very largely and generally adopted if the present demand was successful. But its principle is not a sound one." Lord Ormidale cited an English case, *ex parte Jackson in re Bowes*, decided in June 1880, as illustrative of a similar attempt; but Lord Young, who differed, saw substantial purposes in the lease quite irrespective of the hypothec created by it, and expressed himself as not moved by the consideration that it was only in event of insolvency that the security bargained for could come to have a real and practical value. In the case of *Cropper & Company v. Donaldson* (17 S. L. R. 749), decided upon the same day, his Lordship also dissented. That case turned upon the right of the pursuers to the balance of the price of a printing press supplied to a man named Wood on certain conditions, but sold by the defender, one of Wood's creditors, under a poinding of Wood's effects executed in security of his debt. The price of the machine was £58, and it was payable in three instalments at intervals of three months. If the price were paid at the end of the nine months the machine was to become Wood's property; the price was, however, here the usual price of such an article. The contract in form was one of hiring expressly so called, and the opinions of Lord Ormidale and Lord Gifford show that they regarded the transaction as one not in form representing what it truly was, as being in fact a sale under cover of a contract of hiring, and consequently as being liable in all the consequences and subject to all the rules applicable to its true character. "The form and terms of the agreement, so far as it has the colour or appearance of a contract of hiring, was a mere device resorted to for the purpose of evading the operation of the bankruptcy laws in the event of Wood becoming insolvent, as he did, before he fully paid up the price of the machine." The difficulty which occurs to us in connection with both of these cases arises from a consideration of the undeniable proposition that a man's creditors must take his property as he himself held it, and that this being so it is not easy to see why if Wood in the one case, and Wingate & Company in the other, were respectively bound, the one to pay the instalments, the other to pay the rent agreed on, their respective creditors should merely from coming into possession be placed in a position that neither of the original debtors could have maintained, and be able to refuse to pay the instalments, or the pactional rent, while still retaining possession of the subjects acquired on that condition.

The decision in *Beattie v. Scott* (July 3, 1880, 17 S. L. R. 714) has fixed the law upon the question of relief in the case of the wife of a pauper lunatic who is confined in an asylum. The man being healthy and able-bodied, is not to be deemed a

proper object of relief in such circumstances. No doubt it is settled that her settlement follows that of her husband, so if there were to be need for relief it would be beyond doubt where that relief should come; but in this case there was no family, she had no one to maintain save herself, she is practically, as was observed, *sui juris*, and not an object for relief any more than an able-bodied woman who might be deserted by her husband.

Among the many consequences of the great and general agricultural depression there have been frequent petitions by curators for power to reduce rents. These, as a rule, have only been granted upon a report by some competent person as to the condition of each farm, not upon a general percentage applicable to an estate. An exception was, however, made in the petition of *Sir G. Macpherson Grant* (June 25, 1880, S. L. R. 703), where on the express condition that the reduction was to be expended on manures for the estate, all the tenants received ten per cent. off their rents during one year.

The case of *Jamieson v. M'Leod and Another*, decided July 13, 1880 (17 S. L. R. 757), again raised the points as to the donation *mortis causa* of a deposit receipt to which we very recently referred when discussing the judgment in *Crosbie's Trustees v. Wright and Others* (28th May 1880, 17 S. L. R. 597). Jamieson died in January 1878, and his wife two months later. In the interval she had uplifted a deposit receipt "payable to either or the survivor" for £50, and the question arose as to the right to this sum between her executors and her husband's. The receipt was the last of a series gradually reduced from £308 to £50. The Court held that the terms of this deposit receipt did not constitute a bequest by her husband to Mrs. Jamieson. "The notion of a legacy may be dismissed at once," observed the Lord President. "It is settled law that a deposit receipt can never be a testamentary paper; and though it be conceived in favour of a person other than the depositor, it is not able to constitute a good legacy." The question came to be whether this was a donation *mortis causa* by husband to wife. On the evidence the Court considered that view to be untenable, there being no indication, beyond the corners of the deposit receipt itself, of any intention to donate.

A somewhat curious result was produced by the form of the entail in the case of *Logan Home v. Logan Home* (13th July 1880, 17 S. L. R. 762), where William Logan Home succeeded to the two estates of Broomhouse and Edrom as heir of entail to his father; but there was a clause providing that should any of the heirs of entail to Broomhouse succeed to another estate of the annual value of £300, they should forfeit Broomhouse unless they renounced the same. William Logan Home accordingly dropped the name of Logan, and his brother George assumed the name of Logan with the estate of Edrom. William died, and George on succeeding denuded himself of Edrom and soon after disentailed

Broomhouse. Having married, he had a daughter born in 1879, and he raised an action as her tutor-at-law against his younger brother (in whose favour he had denuded himself of Edrom), pleading that his daughter was a nearer heir of tailzie, and that his brother was bound to convey to her that estate. The Court were unanimously of opinion that the younger brother must denude in favour of the daughter, because he had got Edrom merely owing to his brother's incapacity to take it; he got it under the entail applicable to it and to no other estate, and in so acquiring it under the entail he was of course subject to the chances of the birth of a nearer heir of entail, as must always be the case.

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## JURISDICTION IN SUSPENSION AND INTERDICT.

DECISIONS on jurisdiction are of great importance in two ways. First, they are the foundations of practice, they distribute all possible cases to the proper Courts, and hence their interest to the working lawyer. Second, they interest the speculative or reforming lawyer, because at present, at least, the question of jurisdiction is the most difficult and the most comprehensive he has to consider, and the actual decisions of the Court exhibit the general principles on which the existing jurisdiction is based, and thus explain what it is necessary to modify or to destroy. The case of *Beattie v. Pratt* (July 20, 1880, 17 S. L. R. 796), decided recently by the Second Division, does not lay down any new rule of jurisdiction, but it deserves some consideration with reference to the principle involved. Shortly stated, it was an application to a Sheriff Court for interdict against the use of inhibition or arrestment on a debt between the parties: the nature of the debt being a disputed balance of contract price for plaster-work. The argument for the petitioner was that the threatened diligence would be nimious, and oppressive, and malicious, he having made offer of consignation. The argument for the respondent was that interdict *ab ante* was incompetent, and he was entitled to use diligence, subject to a claim of damages if the diligence was wrongly used. The Court did not adopt any of these contentions. They indicated that there might be very special cases in which interdict *ab ante* might be granted against the use of inhibition and arrestment, but *ex proprio motu*, and no doubt to the astonishment of both parties, who had not quarrelled with the tribunal before which they had originally appeared, the Court objected to the jurisdiction of the Sheriff Court, which in this case both Sheriffs had exercised by dismissing the petition on the ground that not interdict, but application for recall of the diligence when used, was the proper remedy of the petitioner. The grounds

of the judgment of the Second Division, as stated by Lord Ormidale, are shortly these. Suspension in the Sheriff Court is limited to the case of diligence or execution, *i.e.* a charge given, on a decree of registration for payment of a sum not exceeding £25, exclusive of interest and expenses. This is proved by the 19th section of the Sheriff Court Act, 1838 (1 and 2 Vict. c. 119), along with which may be taken the 116th, 117th, and 118th sections of the Act of Sederunt, 10th July 1839. These sections undoubtedly confer on the Sheriff a limited power to that effect, and it is not suggested that, apart from the statutory provision, the particular remedy of suspension is known in the Sheriff Court. (See two unanimous authorities, Mackay, i. 207; Dove Wilson, p. 437.) Therefore, so far as the form of suspension is concerned, Lord Ormidale rather understates the case when he says "a suspension or stay of the execution of diligence is as a general rule incompetent in the Sheriff Court;" for suspension is undoubtedly incompetent, except in so far as permitted by the statute. The next step of the argument is that the petitioner's application for interdict is really a suspension. This is highly necessary, as the jurisdiction of the Sheriff Court in matters of interdict is stated by the authorities to have no limit (Dove Wilson, p. 379). Lord Ormidale does not enter fully into this matter, but he refers to the case of *Thoms v. North British Bank* (8th June 1848, 12 D. 1254). That was an application in a Sheriff Court for interdict against the holder of a protested bill assigning or indorsing it, or recording the protest, or raising diligence against the petitioner upon it. The Sheriff-Substitute in that case sustained his jurisdiction on the ground that though he had no power to interdict diligence under a decree, yet there was no decree in the case (the allegation being that the holder had large funds of the petitioner's), and that the Sheriff had power to interdict any threatened unlawful or oppressive procedure which had no decree for its warrant. The Sheriff-Principal and the Court of Session, however, held that the proceeding was virtually a suspension under colour of an interdict *ab ante*. Lord Cuninghame said, "The application was not founded on any allegation of violence or fraud recently committed, in which case the Sheriff might have had jurisdiction as a matter of police [*sic*] summarily to interfere to prevent immediate mischief, . . . but upon a condition with reference to the appropriation of bank stock said to have been made or understood at the date of indorsation." And so in the Inner House the view was taken, as concisely expressed by Lord Cockburn, that "this is just a suspension without a bill and without caution." Lord Medwyn said, "Were this petition to be sustained as competent it would be making void the use of the Bill-Chamber altogether. Interdict is no doubt a most useful process in the Inferior Court to settle summary questions in a summary way. But this is not a possessory question. It is rather an attempt to rescind the indorsation of a bill." And the Lord Justice-Clerk said, "*It would*

*be obliterating all distinction between the Superior and the Inferior Court* if any part of this prayer were sustained." It had been attempted to distinguish between interdict against indorsation and interdict against diligence. Such is the case of *Thoms*, on which apparently Lords Ormidale and Gifford proceed as an authority in the case of *Beattie v. Pratt*. Lord Gifford, however, takes up a more distinct position. He says, "Inhibition can only issue under the Signet and under the control of the Supreme Court; and that raises the question whether a Sheriff has jurisdiction to stop the issue of a diligence which can only competently issue under the authority of the Supreme Court, or jurisdiction to interdict a litigant from applying to a Supreme Court for diligence which the Supreme Court can alone issue. I think the Supreme Court alone has jurisdiction to stop its own warrants or to suspend its own diligence." There is a good deal about supremacy here which will require analysis, but in the meantime it must be noted with reference to the case of *Thoms* that it was in substance a proper suspension; it was an application to prevent a threatened charge on a bill, the peculiar function of a suspension. The process form of suspension is old established and well known; it at one time proceeded by bill, which was also used in the case of privileged summonses and in applications for the warrants of diligence; and bills were never heard of except in the Bill-Chamber. A large part of the business of the Bill-Chamber was of a summary character, and its practice was framed to secure despatch; but the peculiar meaning of bills was that the Court professed to retain a certain control or discretion over the issue of writ or diligence under the Royal Signet. It is said by Mr. Mackay, in his work on Practice (i. 61), "The object of bills was that private persons should not be allowed to set in motion the law and the means of execution it provided until the Crown, by the advice of the judges, was satisfied that this was necessary." The exclusive jurisdiction of the Bill-Chamber in suspensions is therefore quite intelligible. It arose at a time when process was more governed by fixed styles than at present, and when the jurisdiction of a Court might be defined by the styles which belonged to it. But it also arose from the claim made by the Court of Session to supervise the issue of Signet letters. This was not a jurisdiction which either geographically or chronologically could belong to the Sheriff Courts. They were not in a fit state to receive it, and they could not have exercised it if they had received it, and accordingly they did not receive it. Whether or not it may now be expedient to extend the jurisdiction of Sheriffs in suspensions beyond the limit fixed by the Act of 1838, is a question of difficulty which of course the judges in *Beattie's* case had no occasion to consider. They properly dealt with nothing but existing jurisdiction, and they decided it partly on the authority of *Thoms'* case and partly on the ground that a Sheriff Court cannot in any way control diligence which issues



from the Supreme Court. It would appear that the authority of *Thoms'* case is not sufficient to cover the facts of *Beattie's* case. In *Thoms* interdict was used as a cover for the peculiar function of suspension. In *Beattie* interdict was asked for a purpose for which suspension is unknown. Lord Stair says (iv. 52, 36), "Suspension is the most general legal remedy against executorials, but it does not reach them all; for there is no suspending of diligence for probation before sentence, nor for suspending of inhibition or arrestment, upon account that the ground thereof is suspended. Yet the suspension has this effect, that arrestments, though upon decreets, may be loosed upon caution." Undoubtedly simple suspension could not be applied for against either inhibition or arrestment. And apparently there is no trace in practice of suspension and interdict being applied for to that effect. The scope of suspension and interdict to preserve the *status quo*, or to prevent the repetition of a wrongful act, is very wide, certainly as wide as that of the simple petition for interdict in the Sheriff Court. But the Bill-Chamber remedy does not seem to have been at any time used against a threatened inhibition or arrestment. The judges in *Beattie's* case seem to think that in certain cases (of which perhaps *Beattie's* was one) it might be used. The Sheriffs in *Beattie's* case thought that the only remedy was to wait for the diligence and get it loosed or recalled. If the opinion of Scottish lawyers were polled to-morrow it would probably be found to agree with the Sheriffs. Our present point is, that although wrongful diligence of this kind may by form of words fall under the general rule that wrongful acts may be stopped by interdict, yet it would be a new thing in practice so to stop inhibition. There being no existing practice, and therefore no writ (either of the Bill-Chamber or other Court) appropriated to the remedy, it seems to be quite clear that neither on facts nor on principle is *Thoms'* case in point. If the appeal is made to the general jurisdiction of the Court in interdict, is this jurisdiction not as extensive in the local as in the Supreme Court, except where practice or the origin of the writ has confined it to a particular Court? Or is there any disability in the local Court to grant the remedy, never before granted, in the case of inhibition and arrestment? In *Beattie's* case Lord Gifford enunciates such a principle: "The Supreme Court alone has jurisdiction to stop its own warrants or suspend its own diligence;" and of inhibition he says it "can only issue under the Signet, and under the control of the Supreme Court." It is perhaps better to take the case of inhibition, as arrestments are frequently both laid on and loosed by the authority of the Sheriff. If Lord Gifford's judgment is intended not as a mere statement of the law, but as an explanation and justification of it, what is suggested is that an inferior Court ought not to suspend diligence, however convenient that might be to the lieges, because a superior Court has authorized the diligence, and thus there would or might be an unbecoming

collision of opinion between two Courts. This principle, however, might be carried further; for if the Supreme Court has authorized the diligence, so as to make it improper for an inferior Court to interfere, why should the Supreme Court stultify itself by recalling its own diligence? A Court divided against itself would be still more unseemly than a quarrel between different Courts. The truth is that it is inconsistent with fact in the majority of cases to suppose that the Supreme Court supervises the issue of diligence. Many letters of diligence pass the Signet, but, as Mr. Mackay has reminded the profession (*Practice of the Court*, i. 61), this is the seal of the Queen, not of the Court. No doubt in certain cases the question of the propriety of the diligence being issued might be raised and discussed before it was issued. Thus, in one of the stages of *Symington v. Symington*, 3rd December 1875, the Lord President observed: "The pursuer in the action of separation and aliment has not alleged that the defender is *vergens ad inopiam*. She had no opportunity of making such an allegation, because her warrant for diligence is contained in the summons, and she did not adopt the course of applying by bill. It rather appears to me that if such diligence is to be used on the dependence of an action in security of a debt not then due, the creditor must proceed by a bill, so as to give the debtor an opportunity of answering the allegation of *vergens ad inopiam*, instead of proceeding to use diligence simply by warrant obtained on the action itself." Wherever this is the proper course and has been followed, Lord Gifford's principle would apply. Indeed the question would be *res judicata* between the parties. But it is notorious that in the great majority of cases inhibition issues as pure matter of form; a form of warrant being by a recent statute introduced to the will of the summons, which is never in Court till after it is executed. So with letters of arrestment and poinding. There might be preliminary bills and a discussion in all these cases, but that is not usual. The arrestment is also in the summons. As regards the warrants inserted under the Personal Diligence Act in decrees of registration, there is still less ground for supposing that they have the authority of the Supreme Court given *causa cognita*. No doubt there are in all these cases well-known forms of relief, such as petitions for recall and loosing, suspensions, and suspensions and interdicts, etc., all of them in the Supreme Court, except where arrestment has been laid on by the Sheriff. But it must be kept in view that with the peculiar exception of suspension, which we have already considered, these remedies all presuppose not only the issue of diligence but its partial execution. The question, however, in *Beattie's* case was whether interdict should issue against the application for inhibition. No inhibition had been applied for. It was merely threatened, and therefore it was impossible that, if the Sheriff Court granted interdict, such a proceeding could interfere with any discretion in the Supreme Court. If the Sheriff Court refused

interdict, and inhibition was used, a petition for recall might be tried. If interdict was granted in the Sheriff Court, that judgment might form the subject of appeal; but unless the judgment was altered on appeal, of course the parties would be bound by the judgment of the Court before which they had both gone. There could be no collision, if that is the *ratio* of *Beattie v. Pratt*. Nor does there seem to be any peculiar mystery or difficulty surrounding the questions presented by an application for interdict against inhibition which would make them unsuitable for adjudication by the judge of a local Court. This test is not indeed a rational one, but it is often applied, and here it fails. Inhibition, no doubt, concerns heritable rights, but this does not now afford a safe line of distinction. If there is no risk of collision, and the question is not too difficult for the Sheriffs, why shouldn't people go to the Sheriff Court if they please? It exists for the purpose of administering justice as cheaply as possible. Considering the respect due to Lord Gifford's opinion, it may be, and probably is, the law at the present moment that *Beattie's* petition was incompetent in the Sheriff Court. But we have endeavoured to point out why the reasons suggested do not seem to be practically satisfactory. There is not nowadays the same jealousy of Sheriff Court jurisdiction which formerly prevailed. Vague talk about "supremacy" and the "obliteration of distinctions" will not support any arrangement which is found to interfere ever so little with public convenience. A good many people are being converted to the simple and comprehensive view, that without abolishing the original jurisdiction of the Supreme Court, the local Courts ought to receive an unlimited jurisdiction, and the greatest facilities ought to be given for cheap and easy appeal.

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## HERITABLE CREDITORS IN POSSESSION.

It is strange that so many doubtful points should occur under so familiar a form of security as the bond and disposition in security. There is, first of all, the great dispute between Mr. Hunter (*Landlord and Tenant*, ii. 571) and Mr. Duff (*Feudal Conveyancing*, pp. 274-276) as to whether the creditor entering to possession under such a security is entitled to grant leases. No doubt Mr. Hunter's criticism on the passage he quotes from Mr. Duff is just. The doctrine of the creditor's power is not established by the case of *Kildonan* (Mor. 14135), and it is difficult to reconcile with the well-known variety of style, which has occasionally been under the consideration of the Court, giving an express power to output and input tenants. But Mr. Duff, who knew practice, must have supposed that the creditor had such a power, whether the case of

*Kildonan* was a sufficient authority or not; and it is certain, and appears from reported cases, that many creditors in the position supposed have exercised the power. On the other hand, the fact that a power is often given by express words is by no means conclusive against the contention that such a power is generally or always given by law. It is impossible to give great weight to the case of *Kildonan*, even on the point which it actually decided, viz. that the creditor in possession in accounting for the rents was not entitled to charge a factor's fee. Conveyancing cases are always largely affected by practice, and Professor M. Bell says (*Conveyancing*, p. 1076, first edition), after citing *Kildonan's* case, "But supposing the case to require the employment of a factor, I cannot suppose that the Court would enforce such a rule now, at least on the *ratio* here given. The creditor is not levying rents as a proprietor. He is not levying them for his own behoof, but under obligation to account." This observation of Professor Bell's is quite consistent with the case of *Jack* (5 Sh. 353), in which a creditor in possession had charged a factor's fee, and was therefore held liable in factor's diligence. It was also held that if he did not do diligence for rents, he was bound to give notice to the owner of non-payment of rent; and that if he chose to output and input tenants, he was bound to keep the houses habitable and tenantable. These are no doubt put as cases of liability assumed by the creditor, but they seem to have occurred under a heritable bond in ordinary form, the precept of sasine in which gave a right of entry and possession precisely similar to that enjoyed by the creditor under the modern bond and disposition in security. As regards the cases decided subsequently to the date of Mr. Duff's book, such as *Forsyth v. Aird* (16 D. 197) and *Blair v. Galloway* (16 D. 291), Mr. Hunter's observations are also perfectly well founded. The one was decided on an express clause "to output and input," and the other was a case of collusion. Lord Rutherford's judgment in *Blair v. Galloway*, though it was recalled on other grounds in the Inner House, is probably the best authority for the proposition that the heritable creditor cannot in the ordinary case enter to possession, held by the debtor himself, and remove his debtor and let the land, as if the lands had been disposed with a proper term of entry and an obligation to remove. The doctrine of *Blair's* case is that the heritable creditor has only three remedies—sale, poinding, mails and duties. The last is impossible where the lands are in the natural possession of the debtor; the first may be inexpedient. And Lord Rutherford in *Blair's* case apparently says that the debtor cannot be removed. It is not certain that this point is generally understood in the profession. Professor M. Bell (*Conveyancing*, 1076, 1077) refers to the case of *M'Farlane v. Campbell* (19 D. 623), in which such a removing was found to be incompetent in the Sheriff Court, and after explaining that the difficulty of removing a proprietor in possession of the subjects of the security

may sometimes be a serious objection to lending money to him, he says, "And supposing the sale not to be advisable, there is no remedy short of an action of declarator of removing in the Court of Session." Now, it may be a fair inference from *M'Farlane's* case that a declarator might be brought in the Supreme Court, although the able judgment of Sheriff Cleghorn, which was adhered to, would be distinctly against that view. But then it must be remembered that in the security in *M'Farlane's* case there was an express power "to output and input," such as was found available to the creditor in *Forsyth v. Aird*. If the whole cases be taken together, they cannot be said to suggest, as Professor M. Bell seems to do, that in an ordinary security, without express power "to output and input," the debtor proprietor might be removed either in the Supreme or in the Inferior Court. The result, looking to Lord Rutherford's judgment, would rather be that there was no such right to remove under the ordinary security, and therefore the question would not arise in what Court that right ought to be enforced. To return, however, to the question of the power of a heritable creditor in possession to grant leases, the very definite statement of Mr. Duff ("He may also set tacks, whether to the debtor or others, and remove tenants") which Mr. Hunter declares to be entirely opposed to both principle and practice, is thus corroborated by Professor M. Bell: "No doubt they" (the heritable creditors) "can grant leases as long as they continue in possession. But if it be meant that a heritable creditor can grant a lease which can subsist after his debt is paid up and discharged, I see no authority for the doctrine unless it be in the view of the Court in the *Kildonan* case, that the heritable creditors are to be looked on as landlords, which I think the Court would hold to a very limited extent only. The creditors' remedy, when the proprietor is not aiding them, is to sell." There can be no doubt of the soundness of the construction here applied to the *Kildonan* case, which really did not go beyond the question of the expense of collection; but it is almost equally obvious that the right of the creditor to grant leases cannot depend on the vague ratio of *Kildonan's* case, which was one of accounting with subsequent creditors, but on a consideration what powers of management may be held to be implied in the right of entry which the law annexes as an incident to the creditor's right. In *Neils* (2 Macph. 168) there is a passage in the opinion of Lord Deas which may be construed in favouring the doctrine of the creditor's power. The scarcity of cases on this interesting question is perhaps not to be regretted, as it probably indicates that heritable securities work very smoothly in Scotland. But it must be admitted that there is a decided want of first principles on the subject, and that it is impossible to have an accurate general notion of the position of the heritable creditor.

We have already mentioned three important points on which the rights of the heritable creditor are obscure. Not long ago we had



occasion to point out how difficult it was to reach any clear or definite principle for deciding the rights of a heritable creditor in bankruptcy with special reference to his remedy of maills and duties. That question was complicated by statutory enactments about the effect of sequestration, but there was apparently a difference of opinion on the Bench as regards the nature of the creditor's right under his bond over the rents. A cognate point recently formed the subject of a reference by the Standard Property Investment Company, as first bondholder, and a second bondholder, to Mr. Keir, Advocate. The second bondholder having entered into possession by decree of maills and duties, and levied some rent, the company claimed from him these rents to the extent of interest due them and feu-duties paid by them. The substance of their contention seems to have been that their prior infestment being known to the second bondholder entitled them to notice of the action of maills and duties. If they had received notice they might have done something to preserve their preferable right. They also pleaded that the second bondholder had by his acts placed himself in the position of the proprietor as regards both interest and feu-duties. The position of the second bondholder, on the other hand, was that under sec. 119 of "The Titles to Land Consolidation Act, 1868," he was simply bound to account to the debtor for any balance of rents recovered beyond what was necessary for payment; and that he had come under no obligation whatever with reference to the debt due the first bondholder. The learned referee has decided in favour of the second bondholder, and we do not see what else he could have done according to the modern cases. It may be difficult to reconcile such a decision with the general principle of *Webster's* case (Mor. 2902), which Professor M. Bell cites as a leading authority (Conveyancing, 1075, first edition), and in which "the Court considered the infestment on the heritable bond as equal to an intimation of the assignation to the maills and duties; and that the heritable creditor was preferable to the arrester, not only for the annual rents, but for his principal sum also." If this were sound, then prior infestment would operate preferable assignation, and the second bondholder would be bound to call the first to the process of maills and duties, or become liable to him for his interest in the rent levied. The ordinary liability when payment is made in breach of an intimated assignation, or recovered through the failure of the debtor to plead a prior right, is that the debtor is liable in second payment. But if infestment is equivalent to intimation to the tenant, it would appear to be also equivalent to notice to the second bondholder; and were it not so, it was said in the *Standard Company's* case that the second bondholder had personal knowledge. No authority is required for the proposition that one creditor cannot with impunity be allowed to attempt the defeat of what he knows to be a preferable right. It is true that in the celebrated case of *Budge v. Wardrop*, July 12,

1872, Lord Kinloch explains the case of *Webster* and also the kindred case of *Kelhead* (Mor. 2785) on the principle that the judicial appearance of the heritable creditor in a multiplepoinding (there was such a process in *Webster's* case) is sufficient to preserve or assert his right. "This proceeds," his Lordship says, "upon the simple ground that what the creditor could at once do by raising a summons of mails and duties may be reasonably supposed to be done, so long as the rents are *in medio*." The supposition is certainly contrary to fact and seems most unreasonable. It is not clear what the heritable creditor could do by raising an action of mails and duties after being cited in a multiplepoinding. It would be very extraordinary if he might extend or complete his right after citation. If the right must be completed by compearance after citation in the multiplepoinding, how does this compete with the prior arrestment of the personal creditor? If the creditor may be cited in a multiplepoinding, must he be cited in a furthcoming? If not, why not?

The last point relating to heritable creditors which we must briefly notice is one which will probably receive some attention at the next Valuation Appeal Court. It is the point raised in what is known as the *Kirkintilloch* case. There a heritable creditor had not entered to possession by poinding or mails and duties, but he had advertised the subjects for sale, and the owners had for some time deserted the premises. In these circumstances the assessor put the creditor on the valuation roll as proprietor, and the Valuation Committee of Dumbartonshire have supported the assessor. It would be improper to make any observations on a case that may come into Court, but it is another proof of the uncertainty attending the position of the heritable creditor.

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## THE DECLINE OF CIRCUIT LIFE.

THE following is the first part of an able and interesting article by Mr. Kinghorn, which appears in the current number of the *Law Magazine and Review*:—

The members of the legal profession are proverbially a conservative body, so far as the traditions and practices of the law are concerned, and even in the face of changes which experience may show to be desirable, or public opinion and convenience dictate, they invariably "die hard." Yet even they must succumb to the inevitable, and recent years have witnessed changes in the legal machinery and practice which, to old practitioners, must have seemed passing strange. Most of the mysteries of the science of special pleading have been relegated to the limbo of the other

results of the learning of the schoolmen, and matters of form must now give place to matters of substance. But great changes, like misfortunes, never come singly, and invariably necessitate others to meet the altered circumstances, and though the members of the Bar may loyally and energetically work to carry out accomplished facts, they are seldom disposed to concede more than they can help to the spirit of innovation. They have, consequently, done little towards adapting their social or professional organization to the changes, and in such matters as concern the Circuits and their customs they still cling tenaciously to old forms and names, as if they could thereby preserve the substance. Yet it requires no seer's vision to perceive that the old spirit of the Circuit life has fled; that there have long been, and still are, influences at work that are slowly altering and new moulding the Circuit system, which influences, in spite of the retention of old names and observances, are likely at no distant date to accomplish the complete effacement of the old Circuit system, with all its attendant observances.

Already by mere inference, but none the less effectually, a proviso in section 8 of the Judicature Act, 1873, "that no person appointed a judge of either of the said Courts" (the High Court of Justice and the Court of Appeal) "shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law," has abolished the ancient order of Serjeants, and their hostelry, ay, and even their plate and other instruments of revelry and hospitality, have come under the auctioneer's hammer,<sup>1</sup> and the proceeds, like Joseph's garments, been parted among the brethren. Never again shall they "spy a brother," or a colt be required to hand the ring to one who has been initiated into the ancient ceremony of "putting on the nightcap" in the Common Pleas. Nor, henceforward, can it be said, "In every Hilary and Trinity Term the Justices of both Benches, and the Barons of the Exchequer do assemble together in Serjeants' Inn to choose their Circuits." Even that ancient anomaly, the "Palatine Silk," that amphibious creation who might be described as a stuff out of water, must cease from troubling, though at best it was but a doubtful honour, notwithstanding the fact that many eminent men have worn it, and we remember one well-known member of the Northern Circuit, now no more, who, having obtained it, thought so little of its advantages, that, at his own request, he was solemnly unfrocked, *coram populo*, and returned to "stuff."

In the olden time, when railways had not come into existence, and all travelling had to be done by road, on horseback, or in rumbling coach or chaise, going Circuit was a formidable undertaking, involving much expenditure of both time and money, and

<sup>1</sup> At the sale of the furniture and effects of Serjeants' Inn, on Wednesday, January 21, 1880, the antique dinner service, containing 144 pieces, each bearing the arms of Serjeants' Inn, and which had been used for many years for the entertainment of legal dignitaries, was sold for £1, 5s., and the old hall, erected in 1678, is, it is said, to be converted into offices.

so great an obstacle was the absence of good roads and travelling conveniences found to be, that though Assizes were directed to be held twice in every year in every county in the kingdom, an exception had to be made in favour of the remote parts, and especially of the four northern counties of Westmoreland, Cumberland, Durham, and Northumberland, where they were held only once a year, viz. in the summer. Indeed, so important a feature was the question of roads and locomotion considered "upon the northern iter," that when the business of any Assize town extended into the Commission Day of the next town, counsel were privileged to appear in Court on that day without their robes; the reason being that ordinarily these would have been consigned to the baggage-waggon, or the clerks, and were already *en route* for the next Circuit town. Long after the reason for it had ceased to exist this rule was religiously observed by the members of the Northern Circuit as one of their especial privileges, and on the last occasion of its observance, not many years ago, we recollect how shocked the Judge who, in the days of his youth, had been at the Equity Bar, looked at the indignity put upon him, as he supposed, by this want of dress, and his puzzled and not altogether satisfied look, even after the explanation had been given and the privilege claimed.

In the treatise on "The Office of the Clerk of Assize," published in 1682, there is the following on the "manner of proceeding at the Assizes:"—

"That justice may twice every year be derived to the people in their several counties, for their great ease and benefit, the King doth in every *Hilary* and *Trinity* Term assign his Justices and Barons of his Courts at Westminster, to take Assizes, Jurates, and Certificates, in every county in his realm, except Middlesex, where his Courts of Record do sit, and where his Courts for his County Palatines be held." After enumerating the Home, Western, Oxford, Norfolk, and Midland Circuits, the author proceeds, "and two others in every *Trinity* Term in the counties of York, Northumberland, Cumberland, Westmoreland, and Lancaster; but in every Hilary Term two only for the counties of York and Lancaster." "The Bishopric of Durham is omitted out of the Northern Circuit, for that 'tis a County Palatine, but the King in every *Trinity* Term grants a warrant to the Bishop of that Diocese to issue out like Commissions to the Judges appointed *to ride that Circuit* for that county, as the King grants to his Judges in other counties" (pp. 1, 2).

With reference to Durham, there is the following in Syke's "Local Records," vol. i. p. 94, under date 22nd August 1642: "Sir Robert Heath, Knt., held the last Assize at Durham under the Royal Commission; after that, all legal process within the county was discontinued, and no Sheriff was appointed till 1646. The first gaol delivery after this interval was before Mark Shaftoe, Esq., April 12, 1647, when six criminals were executed. John Wastell,

of Scorton, Esq., delivered the gaol by Commission in July 1648, when nine criminals were executed."

Lord Abinger, in his autobiography, writing of the spring of 1792, says, "The next Circuit took me only to York and Lancaster. It was the practice then for one Judge only to take the Spring Circuit, the more northern counties being omitted" (*Memoirs of Lord Abinger*, reviewed in the *Law Magazine and Review*, No. CCXXV. p. 49). The omission to hold Assizes in the four northern counties in the spring continued down to the year 1819, as appears from the following extract from Syke's "Local Records," under date March 22, 1819: "Jonathan Raine, Esq., arrived in the city of Durham, and opened his Commission for holding a general gaol delivery in the four northern counties. March 27th he arrived in Newcastle, and opened his Commission in the Town and County Courts. These were the first Spring Assizes held north of York." But down to 1830 only one Judge went the four northern counties in the spring.

In those days there was a certain amount of romance and adventure in Circuit life—when Thurlow rode the Western Circuit on a horse procured "on trial;" Eldon went the "Northern iter" on a hired horse, but was obliged to borrow one for the youth who rode behind him, in charge of the saddle-bags, in the capacity of clerk; and North, afterwards Lord Keeper Guilford, when riding the Norfolk Circuit, got mellow and had to be put to bed in a public-house, while "the rest of the company went on for fear of losing their market" (*Campbell's Lives of the Chancellors*, vol. iii. p. 441). Even the perils of the road had to be shared by the gentlemen of the long robe in comparatively recent times. Thus we find that Mr. Wood and Mr. Holroyd (both of whom were afterwards raised to the Bench), when crossing Finchley Common on their way to join the Northern Circuit, were stopped by a gentleman of fashionable appearance, who rode up to the side of the carriage and begged to know "what o'clock it was." Mr. Wood, with the greatest politeness, drew out a handsome gold repeater and answered the question; upon which the stranger, drawing a pistol, presented it to his breast and demanded the watch. Mr. Wood was compelled to resign it into his hands, and the highwayman, after wishing them a pleasant journey, touched his hat and rode away. The story became known at York, and Mr. Wood could not show his face in Court without some or other of the Bar reminding him of his misfortune by the question, "What's o'clock, Wood?" (*Law and Lawyers*, vol. i. p. 142, 1840.)

The same authority already cited—Syke's "Local Records"—writes under date 1278: "It appears to have been customary for the King of Scotland, the Archbishop of York, the Prior of Tynemouth, the Bishop of Durham, and Gilbert de Umfreville<sup>1</sup> (by their

<sup>1</sup> The King, it is true, *never* dies. But Gilbert de Umfreville was not in the same position. The "local authority" seems here to confound a solitary incident with a custom.—EDITOR of the "*Law Magazine and Review*."



bailiffs) to meet the Justices coming to Newcastle, to hold pleas, and ask their liberties of them, when they came from the parts of Yorkshire, at the head of Gateshead, at a certain well there called, 'The Chille Welle,' or at 'Fourstanes,' when they came from Cumberland." And in 1280: "The Justices itinerant held their Courts in the Churches of St. Nicholas and St. Andrew, in Newcastle."

The circuiteer set out on his biennial pilgrimage in a post-chaise if he was a man of means, or mounted on some sturdy steed if otherwise, while some beardless youth, seated among the saddle-bags on another nag, in the capacity of clerk, brought up the rear—the heavier baggage being consigned to the Circuit baggage-wagon. But in whatever mode he journeyed, the etiquette of his profession had decreed that he should not avail himself of any stage-coach or other public conveyance, as he might thereby have an opportunity afforded him of meeting an attorney and "hugging" him, *i.e.* making himself agreeable to him and securing his briefs: and that would be taking an undue advantage of his brethren. Arrived at the Circuit town, he could not enter it before the Judges, or at least not before mid-day of the Commission Day, so that all might have a fair start in the race for briefs; and, even when he had got within the "happy hunting-grounds," he was not allowed to stay at, or frequent any public inn, lest the same temptations to "hugging" and other undue influences should be presented to him—but he must go into lodgings, for which, of course, he had generally to pay an exorbitant price, there being no keener appreciators of Circuit etiquette than the landladies. In some of the northern towns they used to adopt a sort of sliding scale of charges—a certain price if you had no business, an extra guinea if you had. If he was fortunate enough to know an attorney in the place, or be related to one there, he could not stay with him, or dine with him, or even call on or be civil to him, without contravening the Circuit Code; and were he even known to utter in public his opinion that any attorney "was a most estimable and highly-respectable gentleman," he was certain to have to pay a fine to the Circuit mess. Even the very Judges were, so to speak, strangers in the land, an old statute of the 8 Richard II. making it unlawful for any one to ride Circuit in a county of which he was a native, or in which he inhabited, without a writ of *non obstante*.

With a body representing the Bar of England—for in those days even Chancery barristers went Circuit—and some Circuits reckoned nearly 300 members—and thus fenced round with rules, the institution of the mess became a prime necessity. Those were the days when, in the words of a song, written and sung by a distinguished member of the Northern Circuit, as it originally existed, many of the juniors might have sung:—

"All round the Circuit I goes without a guinea,  
All round the Circuit for two months and a day;  
And if anybody axes me the reason why I goes it,  
It's because I don't know how to earn it any other way."

So numerous a body—often for a fortnight in one town—could not be held together without rules for its guidance and control, and the appointment of officers whose duty it should be to execute them. These were as necessary for the Guild in its perambulations as when located in its Inns of Court; and the Grand Court with its Attorney and Solicitor-General, its Crier, its messengers, its Master of the Revels, and Poet Laureate, and even its Bishop, had its distinct sphere of usefulness as well as its comic side. The High Jinks themselves tended to repress irregularities and malpractices, while adding to the hilarity and amusement of the members. The more serious business was of course transacted before dinner; but even in the after-dinner “quips and cranks” and uproarious mirth and chaff, a salutary hint could often be conveyed, and a warning given to one who was hovering on the brink of malpractice, and be the means of averting future unpleasantness and severe measures. These were, besides, but the reflection of the Revels of the Inns of Court, where, as in the Middle Temple Hall, the Master of the Revels after dinner sang a “carol or song, and commanded other gentlemen there then present to sing with him and the company;” or when, as in Gray’s Inn, after dinner “a large ring was formed round the fireplace,” when the “Master of the Revels taking the Lord Chancellor by the right hand, he with his left took Mr. Justice Page, who, joined to the other Serjeants and Benchers, danced about the coal-fire according to the ceremony three times, while the ancient song, accompanied with music, was sung by one Toby Aston, dressed as a barrister,” in 1773.

In those days when men were accustomed to sit far into the night, it was but natural that the mighty intellects and reverend seniors, after the labours of the day, should unbend a little under the influence of old port, and seek relaxation in the flow of soul and interchange of chaff, as well as reason.

One ceases to wonder that an occupant of the Woolsack, when a member of the Oxford Circuit, should have occupied the office of Crier, holding a fire-shovel in his hand as the emblem of his office; that Lord Eldon, while he was Attorney-General of the Northern Circuit mess, indicted Sir Thomas Davenport at the Grand Court at York, for murdering a boy “with a certain blunt instrument of no value called a long speech;” or that Serjeant Prime was fined by the Grand Court of his Circuit for setting a boy to sleep by his eloquence. There even seems no incongruity in the practical jokes of those days that have since become historical; the hoax upon “Jack Lee” at York, with the dummy brief, *Rex v. Inhabitants of Hum Town*, drawn up by Wedderburn and Davenport; or that practised on Boswell at Lancaster, when he moved for a writ of *Quare adhæsit pavimento*; or that a late Chief Baron had been crowned with a punch-bowl at York, “in the days when he went circuiting;” and that such men as Alderson, Tindal, Serjeant Cross, and others joined in a quadrille to the tune of “Fol de rol rol,”

“but Alderson setting off wrong, put the rest out, and the whole was soon a scene of confusion.”

Much has been written and said as to the value, for purposes of discipline, of the Circuit Grand Court “held *foribus clausis* among the barristers themselves, in which toasts were given, speeches were made, and verses were recited, not altogether fit for the vulgar ear” (Campbell’s *Lives of Chief-Justices*), where the privilege of unrestrained freedom of speech which prevailed was reduced to the following rule by an Attorney-General of the Northern Circuit (Lycester Adolphus): “Never sacrifice your friend to your joke, but remember that man is not your friend who would stand in the way of your joke.” There seems to be a general consensus of opinion as to the tendency of the amusements of the Circuit table to promote friendship and to bring the leaders of the profession in contact with the juniors, and thus produce a feeling of harmony and goodwill amongst the Bar, which was productive of the best effects. The terms of intimacy in which the counsel who went the Circuit lived, are pointed to as one of the chief characteristics of those days; and the free interchange of opinions between seniors and juniors as giving rise to sentiments of kindness and respect, and, indeed, the strictness with which the etiquette of the Bar is maintained in England is alleged to be owing, in a great measure, to the institution of the Circuit Court for the trial of all breaches of professional etiquette.

The methods of procedure of such a tribunal were doubtless admirably adapted to secure the objects in view; it could pass “from grave to gay, from tender to severe,” and could fine the venial offender half in jest, while the graver breaches of etiquette could be visited with all the severity they deserved—even to the extent of expulsion from the mess. Thus, in Lord Eldon’s time, we find in the Northern Circuit fines for the following offences: “Lancaster, Grand Night, 29th March 1783. Jno. Scott, Esq., for having come into Lancaster the day before the Commission Day, and having taken up his abode that evening at the King’s Arms in Lancaster, fined one gallon.” “Carlisle, Grand Night, 14th August 1784. Mr. J. Scott convicted of travelling between Durham and Newcastle in company with Mr. Clayton, an attorney, fined one gallon.” “Lancaster, Grand Night, August 1784. The following gentlemen were fined a bottle each for making a party to dine from the rest of the Circuit, at a different house than the Circuit house, in violation of the rules of the Circuit.” “Lancaster, Spring Assizes, 1783. Mr. S. Heywood was congratulated on coming in his new carriage, and Mr. J. Scott congratulated for the like.” On the other hand, there have been instances, in very recent times, of appropriate action being taken in the case of graver offences, in which the offenders have, with all due formality, been either admonished or expelled from the body altogether, though happily such instances are rare.

The palmy days of Circuit life, however—when the Grand Court flourished and revelry ran high—were in the times when locomotion was difficult, when Turnpike Trusts were not, and roads were bad: and people and their business could afford, or were obliged, to wait. Then the advent of the legal army was an event in the dreamy life of an Assize town; Assize balls and other festivities abounded, and a Circuit “Bespeak” was an honour sought after by the lessee of the local theatre at every Assize town. We can still remember threading our way, with a late Baron of the Exchequer (then a gay circuiteer), to the Theatre Royal, Durham, and listening to a noble army of two announcing to the villain of the play that resistance was useless, as they had surrounded the house. The glories of the festivities on an Assize Sunday at the residence of John Jones, of Ystrad, in his time a leader of the old Carmarthen Circuit, and the dinners of “Lawyer Fawcett” to the members of the Northern Bar, in Lord Eldon’s time, when there were such struggles between the claims of “consultation” and the host’s old port, are enshrined in history; while the hospitality extended to the Northern Circuit by the lord of Lowther Castle, was continued down to a very recent period (curiously enough, this having originated at a time when there was only one Assize in the year in those parts, it was given only during the summer Assizes).

But times have changed since then. As the Arab Sheik said to the author of “Eothen,” “Puff! puff! there is nothing like steam:” it has displaced the stage-coach, the chaise, and even the roadster. The baggage-waggon lingered longest, but even it had to succumb a quarter of a century ago on most Circuits, though it still exists on the Western, and might, until recently, have been seen at the accustomed times in the Temple ready for the reception of the baggage of the Circuit; but so little were its uses dreamed of, that it has, ere now, been mistaken for a prison-van. Now the leader or the junior, who, by the aid of the midnight mail and the Pulman car, can be in London to-day and in the remotest part of the country to-morrow, is no longer placed under circumstances favourable to the cultivation of the old Circuit life and its attendant associations. The clannish or tribal spirit has vanished, and that cosmopolitan idea—the outcome of the steam-engine and other facilities for intercommunication—which would obliterate nationalities, has left its impress indelibly marked on this as on other institutions.

The circuiteer, if a silk or leading junior—“heavy juniors” they call themselves—is no longer thrown into the society of his fellows for two months at a stretch; he doesn’t pass a great part of every year in their company, in social intercourse with them, at the mess-table or elsewhere; but he comes down to his circuit more like one in possession of a special retainer, who, the moment his work is done, is whisked back to London. If ever he does deign to honour the mess with his presence, it is more after the manner of a patron than of the boon companion of old.

Comparatively few men now go all round a Circuit, the majority restricting themselves to those towns where they are known; others only go at certain times of the year; while some even require special fees to go to certain towns on their own Circuit, and will only take special jury causes at others.

Even the "Cock of the Circuit," who sticks to it and goes all round, spends most of his time in the society of his papers, or, if in one of the more populous towns that can boast a club, he may disport himself there, and give entertainments to his friends and admirers, and thus become, instead of a supporter, a formidable rival of the Circuit mess. For that loyalty to the Circuit mess, which used to be one of its chief characteristics, and a breach of which was invariably the subject of fine in the old days—and we have even known instances of the messengers bringing a deserter into Grand Court at York, from the Judges' table—has been completely set at naught, and its rules have become very much like a royal prerogative, viz. that law in the case of a junior which is no law at all in the case of a senior, and we no longer find the leaders regularly dining at the mess and entering into its social enjoyments as of old, under the last generation of leaders, such as Stephen Temple, James, Bliss, Quain, etc. Under such circumstances it need scarcely be matter of surprise that the mess languishes, that the attendance is but spasmodic (ranging from 50 or 60 down to 3), and that, whereas not so many years ago it was no uncommon thing to see from 80 to 90 at Grand Court at York, and 130 to 140 at Liverpool, from 60 to 70 would now be a large muster, and of these three-fourths would be "provincials;" so that now we have not a homogeneous body but different elements to deal with at each place, and without a sufficiently numerous body going all round to make it any one's interest to keep up the ancient traditions. In old times when, as Lord Campbell has stated, there were not more than three or four Queen's Counsel on any Circuit, it was a matter of just pride to be like Serjeant Cockell, "The Almighty of the North," or, "The Cock of the Circuit," in the days of Law and Scarlett, when men were conscious of a power and dignity that required no bolstering-up. But now, when Q.C.'s are thick as the "leaves in Vallombrosa," and every one considers himself a "Cock," the distinction has, as an eminent legal luminary (Lord Chelmsford) observed, become "all stuff," and must be hedged round with a due amount of reserve—the traditionary glories and observances of Circuit being left to the care of the junior members, to whom they are but traditions. Thus the men who owe their rank and position to their being members of the Circuit, are—perhaps unconsciously—working out the disintegration of the institution which has raised them, and are kicking the ladder from under their feet. For it is tolerably certain that many of those who have obtained rank in the profession, owe it entirely to the fact of their being members of the Circuit and to their "sticking to it," and thus



obtaining practice and reputation among a comparatively small and local body, when, otherwise, they might, like Viola, have

“Pined in thought ;  
And, with a green and yellow melancholy,  
. . . Sat, like Patience on a monument,  
Smiling at grief,”

in the great world of London.

The administration of justice throughout the kingdom had, up to the time of the institution of Justices of Assize, been entirely of a local character,<sup>1</sup> and the ancient County Court was the principal tribunal for the administration of the civil business of the kingdom, as “the tourn and the leet derived out of it, were anciently the principal Courts of criminal jurisdiction.” “The administration of the common justice of the kingdom,” says Hale, “seems to have been wholly dispensed in the County Courts, the Hundred Courts, and the Courts Baron. This doubtless bred great inconvenience, uncertainty, and variety in the laws.” And “notwithstanding some striking advantages, was certainly pregnant with great evils” (History of the Common Law, c. 7). The tendency of Assizes, at least from the time of Edward I., when the Justices of Assize and *Nisi Prius* were also constituted Justices of gaol delivery, was to diminish the importance of the local Courts, and to draw away the business from them. For political as well as legal reasons, the local jurisdictions were discouraged and languished: the statute 6 Ric. II. stat. 1, c. 5, directed the Justices of Assize and Gaol Delivery to hold their session in the principal and chief towns of every county where the Shire-Courts were held; and the local Courts were thus overshadowed by the grandeur and power of the more extended jurisdiction. And thus all these local Courts, in which “justice was administered near the houses of suitors with despatch, and without much expense” (Reeve’s History, p. 17), were gradually superseded by the Circuits of the King’s Judges.

In those days there were no local Bars—the long intervals between the visits of the itinerant Justices, and the languishing state of business in the local Courts afforded no occupation for such. The “Provincial” had always existed, but still he was *rara avis*, and was more of the country gentleman desirous of enhancing his local importance, instead of pining in the obscurity of the metropolis, on the principle that it is “better to rule in hell than serve in heaven.” Still the real working “Provincial”—the man desirous of living by his profession—was not unknown; Chief-Justice

<sup>1</sup> Lyttleton, in his “History of Henry II.,” writing of the institution of Justices of Assize, after quoting from Hale, that business in the County Court was carried by “parties and factions,” adds: “There was another reason for it (the institution of Assizes), of a political nature, namely, to obviate the mischiefs arising to the Crown, and to the whole commonwealth, from the hereditary jurisdictions introduced into England by the Feudal system then established under the first Norman kings” (vol. iii. p. 208).

Wilmot, though doing a good business on the Midland Circuit and in London, in 1754 sold his chambers in London, and retired to Derby, where he settled with his family, to practise as a "Provincial," whence a year afterwards he emerged a Puisne Judge of the King's Bench. In 1777, Eldon, when still on the "rope-walk" on the Northern Circuit, seriously resolved upon settling as a "Provincial" in "canny" Newcastle, and actually hired a house there for that purpose, though ultimately dissuaded from it. But still, the local Bar, in its modern sense and dimensions, was a thing unknown, and even up to within the last twenty years, their numbers, even in the most populous districts, might have been counted "on one's fingers." But the improved facilities for inter-communication have wrought many changes—everything has moved more rapidly. The old cumbrous machinery of the County Court, however, remained unchanged, and the Courts of Request, and other local Courts instituted to remedy its defects (in 1844 there were 120 such local Courts created by Act of Parliament in England), were the subject of frequent complaint, because "of the great variety and irregularity in their administration, the proceedings being conducted by Commissioners who had no knowledge of the law, and whose attendance was not constant" (Parl. Debates, 1839). And the Assizes only came at long intervals. These defects and delays were complained of, and it was not unnaturally said that "it could not be denied that the rendering justice more speedy, and the lessening of the length of time during which offenders were imprisoned before trial, were subjects which were of the greatest importance to the people at large." This idea of bringing justice to the suitor's door has been wrought out on the lines of the old local Courts, starting from the County Courts Act of 1845, for instituting County Courts in certain localities in which the establishment of such tribunals appeared to be required.

Under the system thus inaugurated the tide of business began to turn, and to flow back to its old love, the local Court, till, according to a return presented to the House of Commons in 1878, there were tried, in the County Courts of the country, during the year ending December 1877, 10,232 actions above £20, made up of 9224 actions above £20, 318 Equity actions, 115 Admiralty actions, 575 actions sent from the High Court of Justice.<sup>1</sup> This

<sup>1</sup> Of all the Courts of local civil jurisdiction, the modern County Court undoubtedly bears the palm; for though a few of the other local Borough, Hundred, and Manorial Courts seem to flourish, such as the Lord Mayor's Court in London, the Liverpool Court of Passage, the Hundred of Salford Court of Record, and a few others, the majority of them show a decided falling off in business. Indeed, in seven of these local Courts, viz. Alston, Clitheroe, Colchester, Ipswich, Lancaster, Nottingham, and Portsmouth, there were no proceedings at all during the year 1877, and in five of those named, Alston, Clitheroe, Lancaster, Nottingham, and Portsmouth, there have been no proceedings taken for more than ten years past (Judicial Statistics, 1878). The chief consideration determining whether or not an action shall be brought in these local Courts instead of the County Court, seems to be the question of costs.

of itself shows the extent to which the local Courts have relieved the superior Courts; and this is more clearly brought out by a consideration of the following figures, taken from a memorial from a Committee of the Northern Circuit presented to the Judicature Commissioners, and published in the second Appendix to their fifth Report. From this it appears that although in the towns of the four northern counties the amount of business has varied but little between the years 1865 and 1872, both inclusive, in such towns as Liverpool and Manchester it has diminished within the same period at the Assizes, though the population of all those places has been increasing.

NUMBER OF CAUSES ENTERED.

	1865.	1866.	1867.	1868.	1869.	1870.	1871.	1872.
Liverpool . . .	315	319	304	278	240	309	234	290
Manchester . . .	195	155	174	143	142	149	146	173

Crime, on the other hand, seems to have been more evenly distributed over the same period, the number of prisoners tried at the Assizes at the two extremes of the same period being as follows:—

	1865.	1872.
Newcastle . . . . .	54	57
Carlisle . . . . .	30	31
Appleby . . . . .	10	8
Lancaster . . . . .	37	21
Manchester . . . . .	209	130
Liverpool . . . . .	195	145

On the Northern Circuit in the spring of 1792 “there were 86 causes to be tried at York, one of which was a boundary cause that lasted sixteen hours, 36 at Lancaster, and 40 to 50 prisoners at each place; but Mr. Justice Buller concluded the whole Circuit in three weeks” (Lord Abinger’s Autobiography, p. 49). In those days the Northern Circuit in the spring included only Lancashire and Yorkshire.

With this increase of local business the rare “provincial” has blossomed into a numerous and formidable body, and places like Liverpool and Manchester, that twenty years ago possessed their half-dozen “locals,” now reckon their local Bars of over 60 at each of those places, while every considerable town—Birmingham, Bristol, Plymouth, Leeds, Newcastle, Hull, etc.—can boast of its local Bar. Localizing from being the exception is becoming the rule, and a considerable number of our most prominent leaders have graduated as “locals”—including the late official head of the English Bar (Sir John Holker), while at least one eminent Queen’s Counsel deems it to his interest to remain a “provincial.”

Comparatively few of the members of any Circuit, under the rank of Queen's Counsel, now make the journey from London as their headquarters, and the tendency of a Circuit in these days is to become an aggregation of local elements, having different interests, different views and ties, whose contact with each other rather resembles the jarring of opposing forces than the harmonious working of one compact body. There is not the same feeling of brotherhood pervading it, and the meeting of the different Bars is but as that of strange tribes or clans encountering each other, each with its peculiar grievances, prejudices, and jealousies. For them the mess is no longer a necessity, but, at most, a luxury, and while it is a convenience to a few, the many seem to view it and its attendant subscriptions merely as an objectionable tax. Those on whom devolves the duty of maintaining its character either will not or do not take any trouble about it; and thus when the chief characteristic of the after-dinner oratory is its broadness, and its most mirth-provoking qualities are referable to the same source, the fortunes of such an institution must be on the wane, and the indifference of the leaders is apt to pervade the whole body. With the rise of local Bars many of the old rules of etiquette have of course been scattered to the winds. With men living on the spot it would now be absurd to say that a barrister could not enter an Assize town before Commission Day; the old rule about lodgings has been long abrogated—though, *in theory*, a barrister on Circuit is still supposed to take private rooms at hotels; and a man now makes his way to an Assize town as best he pleases. In fact it is difficult to say what there is remaining on which a Circuit Court could adjudicate with effect; and though it might crush a weak or an unknown man, it is doubtful whether it could do much in the case of a powerful one, without the aid of the regular and recognised authorities, viz. the Inns of Court.

Everything seems to indicate that the old forms of Circuit life—like the Circuits themselves—are no longer adapted to the spirit of the age and are doomed to change, or to vanish altogether. There is no magic in a name; it will prove no “open sesame” to reveal the glories of the past, or to infuse life into the dry bones of a moribund institution. Its framework—its names and its forms—remain, like the ivy-mantled towers of the Feudal Castle, to remind us of its former glory; but still, however interesting, it is only a ruin, and, as the author of “Coningsby” has written, “the age of ruins is past.” Indeed, the proceedings of the Circuit Grand Court in the present day are very much like the revival on 2nd February 1880 of the old Temple Feasts, by giving a reading of the “Twelfth Night” originally performed in the Middle Temple Hall in 1601-2, and to which Raleigh and Overbury may have been listeners. The old Hall and its oaken roof are still there; but after the lapse of nearly 280 years, however grand and artistic the “revival” may be, it is difficult to recall the spirit of the past, and your most brilliant

efforts appeal to it in vain; the players' voices are still and the echoes of their applauding audiences have long ceased to linger round the spot.

The Grand Court is so intimately associated with the mess that whatever affects the one must react on the other; and when men take so little interest in the mess that a full attendance on Grand Night is only secured by the sanction of a fine, and on ordinary occasions extra attractions in the shape of dainties fail to induce a full attendance, while caterers require guarantees of numbers, and even then are fain to be rid of their contracts, the interest taken in such an institution is evidently not great. There is even a fear that the members may come in time to take as little interest in the decrees of the Grand Court, and to view its decisions as those of a clique rather than of the whole body.

The continuity of thought and tradition has been broken—the times and the men have changed, and with them the habits of society. The levelling influences of travel and intercourse have produced their effect, and the Bar is now entered upon more as a commercial speculation and as a means of living than from any exalted notion as to its position. Its rules and observances have come to be regarded chiefly from the utilitarian point of view—from their fitness to secure the end, and men are apt to ask themselves what all these mean. In the effort to sustain that which is obsolete and not in keeping with the feelings of the times, men seem painfully conscious of the undignified *rôle* they are playing, and the result is dulness that may be felt and a sense of relief when the farce is over.

And yet, whatever may be the fate of the Circuit mess, something is evidently wanted to perform similar functions to those of the Grand Court. Mere irregularity does not make a man a criminal, and mere laxity of practice will not subject a barrister to disbarment. Some means, therefore, are wanted of checking mere irregularities as distinguished from crimes or acts that merit punishment—of admonishing and touching lightly those things whose consequences might be too serious to be overlooked, but be too venial or too doubtful to warrant severe measures.

This duty was fitly intrusted to the Grand Court, which, in dealing with its members, could either act directly by tendering advice or warning; or negatively by declining to associate with a delinquent, or expelling him from the body. But in cases of graver import they could only represent them to the Inns of Court, and leave those bodies to deal with them as they deserved. If the Circuit and its organization must change, as seems likely, before the growth of the local Bars, the members of the Bar must, if their position and interests are to be maintained, adopt some means of supplying the place of the Grand Court, and for this purpose there seems nothing better fitted than the Council of Discipline of the French Bar, or the Dean and Council of the Faculty of Advocates in Scotland, which have been found to work well in practice.



## LIMITATION OF CARRIERS' LIABILITY—CONDITIONS IN PASSENGERS' TICKETS.

(Continued from p. 485.)

THERE are three leading cases of recent years in which the question was discussed whether a passenger is bound by a condition in his ticket freeing the carrier totally or partially from the ordinary liability of carriers.

In the case of *Zunz v. South-Eastern Railway Company* (L. R. 4 Q. B. 539) the plaintiff took a ticket of the defendants' company to be conveyed as a passenger from London to Paris, on which was printed: "The South-Eastern Railway Company is not responsible for loss or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South-Eastern Railway Company's trains or boats." The luggage was lost off the company's own line. The memorandum not being signed, the Railway and Canal Traffic Act would have protected the passenger if it had applied, but the Court held that the Act did not apply to any line except that worked by the company. Consequently, the passenger had to fall back on his rights at common law. The Court held he had no case.

Chief-Justice Cockburn said: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid the money, and when nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer—however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and, moreover, when he believes that he has made a contract binding the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed—still we are bound on the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it, and must be bound by them."

In the case of *Henderson v. Stevenson* (2 Rettie (H. L.), 71), which came up on appeal to the House of Lords from the Second Division of the Court of Session, this passage was cited, but it was distinctly repudiated as a correct version of the law.

In *Henderson's* case the passenger took a ticket by a steamer from Dublin to Whitehaven. On the back of the ticket was printed these words: "This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants or

otherwise." There was nothing on the face of the ticket directing attention to what was on the back. In the company's office a general notice was hung up containing a similar condition. The pursuer had not read either the notice on the back of the ticket or the notice in the company's office. The vessel was wrecked and the luggage was lost. The House of Lords, affirming the decision of the Court of Session, held the passenger was not bound by the condition. Their Lordships said there was no authority for holding that such a condition was binding. Cases like those of *Shaw*, *Chippendale*, *Austin*, and *Carr*, where the ticket was signed by the consignor, or where the ticket, condition and all, was founded on in the declaration as constituting the contract, had no application to a case where the condition was not only not signed but was not known, and where it was not only not founded on as part of the contract but was repudiated. One ground for the decision was the specialty that the contract was complete on the face of the ticket, and on the face of the ticket no reference was made to the condition on the back. But the main ground of the decision and the broad general principle laid down was that there must be assent, and that it lay upon the contracting party seeking to limit his liability to prove the assent; and further, that no presumption of assent arises from the fact that such a condition has been handed to the passenger without any means being taken to draw his attention to it, and when, as a matter of fact, he has been in ignorance of it.

Lord Cairns said, "I asked with some anxiety what was the authority for the proposition that a member of the public was to be supposed to have contracted under these circumstances in that way, and I have listened with great attention to all the authorities that have been cited." And his Lordship intimated that none of the cases went to such an extent, that "in all there might indeed be a question what was the construction of the contract or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was *assented to and was entered into* by the person who received the ticket." In fact, the element of assent was present in these cases, and that evidently is the element which the Lord Chancellor thought all-important. His Lordship added that "it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document, complete upon the face of it, can be exhibited as between two contracting parties, and without any knowledge of anything besides, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of

the contract presented to him." In conclusion the Lord Chancellor said the question did not depend upon any technicality of law or upon any careful examination of decided cases. The question was simply one of common sense. "Can it be held that any person—unless he is in default, unless something is said to him referring him to some place where he will find terms applicable to the contract he is entering into—has entered into a contract containing terms which, *de facto*, he does not know, and as to which he has received no notice that he ought to inform himself upon them? It appears to me to be impossible that that can be held." Lord Chelmsford was equally decided upon the point before the House and upon the principle which must regulate such cases. "The liability of the company by law to a passenger is to carry and convey him with reasonable care and diligence. . . . Of course any person may enter into an express contract with them to dispense with this obligation and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the want of care or negligence, or even the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice without such assent they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents. I think such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly consented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger." Lord Hatherley and Lord O'Hagan gave similar opinions; the latter learned Lord observing that "when a company desires to impose special and most stringent terms upon its customers in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and accepted, and that the acceptance of them shall be unequivocally shown by the signature of the contractor."

Lord Chelmsford and Hatherley took an additional ground, viz. that the ticket does not form part of the contract—that the contract is complete upon the fare being paid and before the ticket is handed to the passenger. There is a good deal to be said in favour of this view of the matter. A ticket seems rather to be a matter of convenience for the regulation of the railway company's traffic. It is a token by which the company informs its servants that it is their duty to pass the traveller along the line to his destination. If you hire an ordinary conveyance no ticket is issued, but the contract is complete all the same. In the old coaching times no ticket was issued; as a rule, the passenger was booked and a copy of the waybill was handed to the coachman or the guard without the passenger knowing anything about the matter. It is only because

of the enormous increase of passenger traffic that this system has been discontinued and the system of tickets has been introduced. Further, as a matter of fact, we know that people do not look at their tickets until after they are in the train, and then only when they are nearing their destination, where they require to give them up. How can that be a part of the contract of which people are not aware until the contract is nearly executed? It may be added that a ticket clerk will not give you a ticket until the money is paid. How can that be regarded as part of the contract which you do not know of, and which the railway company will not allow you to know of until the money is paid?

There is one special reason in the case of railway companies against any presumption of knowledge of or assent to a condition in the ticket. We all know the facilities which railway companies afford for the purchase of tickets. In the case of *The London and Brighton Railway Co. v. Watson* (3 C. P. Div. 29), Lord Coleridge remarked, "No information is afforded by the case as to the facilities afforded by these companies for the purchase of tickets. But judges cannot strip themselves of their ordinary knowledge. It is at least possible (numerous examples show that it is highly probable) that tickets are sold by it with an almost contemptuous disregard of the commonest convenience of the public. A single small hole, open often only just as the train is starting, round which hole a struggling and eager crowd congregate, so numerous and so hurried that decent comfort and inquiry are out of the question, is the common facility, if facility it must be called, to which railway companies intrusted by Parliament with a carrying monopoly subject the long-suffering people of this country."

In the case of *Burke v. South-Eastern Railway Company* (L. R. 5 C. P. Div. 1) a decision was pronounced which we do not think reconcilable with the principles laid down in *Henderson v. Stevenson* (although the judges studiously disclaimed any intention to impugn the authority of that judgment), and which shows a tendency on the part of the English judges to cling to their old artificial doctrine, which we had thought had received its *coup de grace* from the House of Lords in *Henderson's* case. Evidently there has been a tendency to hark back to the doctrine of special acceptance, with the old tendency to retain the name of special contract. The plaintiff took a ticket of the South-Eastern Railway Company from London to Paris. He received a book of coupons of eight pages, on the cover of which were the words, "Cheap return ticket, London to Paris and back, second class," and some statements as to the period within which the ticket was available. No reference was made to the inside of the book or to anything else. On one of the inside pages was a condition stating that "each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats." The plaintiff was injured on a French line. He brought an action against the company, and

at the trial swore that he had not read and did not know of the condition. The jury gave a verdict in his favour. The Court of Common Pleas, without calling on the counsel for the company, gave judgment for them. In distinguishing the case from *Henderson v. Stevenson*, Lord Coleridge said in that case, "It was said that one side only was to be taken as the contract, because there was no reference to the other side, and that the jury must be taken to have found that the plaintiff had a right to assume, and did assume, that the one side contained the whole contract. . . . The House of Lords assumed that the whole contract was contained on the one side of the one piece of paper. . . . The facts here are entirely different. . . . Here is a small book with many pages, and it is admitted that the whole of the leaves are during the continuance of the contract to be made use of, and the passenger cannot turn over the first sheet and make use of the first coupon without having under his eyes the condition on which the defendants rely. It cannot be contended that the first sheet forms the whole contract, because it was admitted that the coupons form part of the contract." (If counsel did admit this they surrendered a good point, and considering the opinions of Lords Chelmsford and Hatherley in *Henderson's* case, their verdancy is quite refreshing.) "Then if the first page and all the coupons form part of the contract, on what ground is page 2 to be rejected? The defendants might fairly say, 'This is the contract, we contract on no other terms than these, the plaintiff has taken this contract. . . . By the ordinary application of eyesight he might have seen the condition.' The mere fact of his not choosing to read, or even of his not having read the term, which was not concealed from him, is no ground whatever for rejecting that any more than any other part of the contract." Now it is admitted that in *Henderson's* case one specialty of the case to which Lord Cairns referred was that "there was no reference whatever upon the face of the ticket to anything other than what was written on the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *de hors*." But as we have already seen from the passages quoted, this was not the only ground on which the judgment of the Court or the opinion of Lord Cairns was based. Indeed it was not the ground at all. The ground was that assent is necessary and assent was not given. Any stress laid upon the circumstance, which Lord Coleridge regards as the turning-point of the case, was given to it in considering whether in the circumstances there was any presumption of that knowledge, the importance of which consists, and consists alone, in its being a necessary element of assent. Are not these words of Lord Cairns in *Henderson's* case as applicable to the case of *Burke* as if they had been expressly intended to meet that case? "Can it be held that any person—unless he is in default, unless something is said to him



referring him to some place where he will find terms applicable to the contract he is entering into—has entered into a contract containing terms which, *de facto*, he does not know, and as to which he has received no notice that he ought to inform himself upon them?" The Common Pleas Division in *Burke's* case thought that could be held, and did hold it. In that case nothing was said to the passenger referring him to some place where he would find terms applicable to the contract he was entering into. The alleged contract did contain terms which, *de facto*, he did not know, and as to which he received no notice that he should inform himself.

In *Henderson's* case the passenger was not to know that there was anything else on the ticket than what appeared on the face, while in *Burke's* case the passenger knew there must be something more in this book of eight pages than what appeared on the face. But how was he to know that the book, among other matter, *contained a condition* limiting the liability of the company? Indeed, as regards any presumption of knowledge from the position of the condition on the ticket, *Henderson's* case was a stronger case for the company than *Burke's*. A passenger is more likely to see a condition on one of the two sides of a ticket than to see it lurking among other matter in the inside of a little book. It was no doubt by inadvertence that the condition was placed where it was, but if the company had planned it they could not have adopted any better means of destroying the chance of the passenger's attention being called to it. On the first page of the book there was a notice about the time during which the ticket was available twice as long as the condition about liability; and a passenger would naturally think that here he had before him all the information it was necessary for him to have. We cannot help asking, why did not the company print both notices on the face of the ticket?

In this case of *Burke* it seems to us that the judges of the Common Pleas Division acted in a hide-bound spirit, refused to alter their preconceived notion upon the subject except to the narrow limits of the particular point decided in *Henderson's* case, utterly ignoring the principle upon which the particular point was decided—a principle expressed in the clearest and in the most perspicuous language conceivable.

The conclusion of the whole matter is this, that a railway company seeking to get rid of its common-law liability, which is an incident of its practical monopoly, must obtain the assent of the passenger. What amounts to assent is a question of fact for the jury or the judge acting as a jury. Knowledge is indispensable to assent. When knowledge is to be inferred from the circumstances of the case, and when assent is to be inferred from knowledge, these are questions of fact. A passenger is entitled to refuse assent. Suppose a passenger is departing with the last train on a Saturday night, and the ticket clerk informs him that the company

issued tickets only on the condition that they would not be liable for any damage, the passenger would be entitled to refuse assent to this condition and to travel under protest. How, it may be asked, is a carrier to certiorate the passenger that he intends to limit his liability? Certainly not by merely printing a condition in small letters on the back of a ticket or inside a book of coupons, which as a rule people never look at, and indeed have not an opportunity of looking at. Any effective certioration of the limitation of liability must be given timeously, and must not be slipped in on the sly. It might be given not at the last moment, and it might be given in a conspicuous manner, just in the same way as the advertisements about Thorley's Food for Cattle and the other wonders of pictorial art are displayed for the edification of weary travellers waiting for the next train at a roadside station. If a passenger were thus certiorated of the terms on which the carrier undertook to carry him, and time after time did travel without objection, it would be difficult to show that he had not assented.

One remark may be added, and that is in regard to excursion trains. A railway company may undertake to convey passengers at a much less rate than the ordinary rate. In such a case it would seem to be the passenger's outlook to know on what conditions he is being carried. The railway company in such a case is not acting as an ordinary carrier.

*Note.*—The case of *Thompson v. The Royal Mail Steam Packet Co.*, referred to as an unreported case in the previous portion of the above article (*ante*, p. 476), is important in showing the extreme lengths to which some of the English judges have gone in maintaining the principle that a bargain is a bargain, and also in forgetting what the bargain was.

The action was brought to recover damages for the loss of a passenger's box. The plaintiff was a passenger from Southampton to Colon in the defendants' steamship *Elbe*. One of the conditions printed on the face of the ticket which the plaintiff signed was that the company would not be answerable for loss, damage, or detention of baggage under any circumstances. Another further condition was that the company should be at liberty to land any passenger suffering from infectious disease. The box in question was placed in the hold and labelled "Colon." Some days after the *Elbe* sailed the plaintiff was taken ill with typhoid fever, and was landed at Kingston, Jamaica, insensible. His box was also landed on the wharf by the defendants, but the plaintiff never heard or saw anything of it afterwards.

The Court held that the company was not liable. The Lord Chief Baron Kelly observed *inter alia* that he would not say there was not some degree of negligence in this case. Whether or not, he would not hold the company liable without the authority of the House of Lords that such stipulations were wholly void. Baron Bramwell concurred, and said that he did not approach the question wholly unprejudiced, as he thought the companies had been somewhat unfairly treated. If he appeared to disagree with the House of Lords, he did so with the greatest respect for that tribunal, whose decisions had always commanded the greatest respect from him. The contract must be strictly construed. "They were asked to say that people could not make their own bargains; the Courts must make them for them."

With great deference to the judges of the Court of Exchequer, we do not think that they rightly construed the bargain between the passenger and the

carrier. There was no condition protecting the company against misconduct, and what they did amounted to that. They were not merely negligent : they did something positively wrong. It was not a case of mere "loss" of luggage. If the carrier had pitched the luggage overboard, we cannot see how he would have escaped liability on account of the condition making him not liable for negligence. When the carrier landed the luggage on the wharf along with an insensible patient, the luggage to be taken possession of by any gentleman of colour or gentleman of character loafing about the quay, what was the difference between this and pitching the luggage overboard ?

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## Correspondence.

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### INEQUALITY OF SENTENCES.

*(To the Editor of the "Journal of Jurisprudence.")*

SIR,—Allow me to draw the attention of your readers to the unnecessarily severe state of the law relating to petty offences of theft, and the painful scenes that are continually occurring at the Circuit Courts in provincial towns, in consequence of the custom prevailing among the Justiciary Judges of visiting each succeeding offence of theft, however petty, with a rapidly increasing severity of sentence till it amounts to neither more nor less than laying the law open to the reproach of gross and useless harshness. The custom appears to be one handed down from ancient times, and long of dying, as all legal customs are, till swept away by some dignitary of the law with a mind of more than ordinary force and independence, or by the voice of humanity speaking through the statute-book. A case of the kind referred to occurred at the last Circuit Court held at Ayr, when a young woman was placed at the bar on a charge of stealing some clothing from a public-house, aggravated by five previous convictions. Counsel stated on her behalf that since her liberation on a ticket of leave in January 1877, granted from the remainder of a sentence of seven years' penal servitude pronounced in April 1872, she had been living without offence, and that the offence charged had taken place when she was under the influence of drink, and that she was suffering from a delicate state of health, which was sufficiently evident from her pale and emaciated appearance. A sentence of seven years' penal servitude was, however, repeated, the judge stating that but for what had been stated he might have made it longer. The sentence was felt by every one in Court, and probably not least by the judge himself, as a most painful infliction, and all appeared to feel that the law, if law it is, rather than a fixed legal custom, is most harsh and cruel, and it was evident the sighing, sobbing of the woman when she realized the blow, raised the sympathies of all present at the immoderate punishment meted out to her. Such scenes almost regularly take place at the Circuit Courts as they

come round, and create a most painful impression on all who witness them of the state of the law in relation to such cases. The sentences passed on the woman in question from 24th October 1866 to 3rd September 1880, and all for offences of theft, were (1) thirty days, (2) twenty-one days, (3) five months, (4) twelve months, (5) seven years, (6) seven years, and besides undergoing the sentences, excepting such part of the longer sentences as may be remitted by ticket of leave on account of good conduct, she would have to be in prison awaiting trial in the four last-mentioned cases—two of which were tried by a Sheriff and jury and the other two at the Circuit—probably on the aggregate a period of six months or more. It is gratifying to see that there are some having the administration of the law, notably Lord Young, who decline to be bound by a custom unsuited in its severity to the conditions and necessities of the times, and reserve sentences of long periods of penal servitude not for women committing petty thefts, but for the perpetrators of crimes of violence, cruelty, and heartless villany.—I am, etc.

JUS.

[There is no doubt considerable divergence in the practice of judges dealing with similar classes of offences, and it is a subject which has of late engaged public attention to some extent in England. While some judges are certainly severe in their sentences, there can be as little doubt that others err in the opposite direction; a sentence of eight months' imprisonment, for instance, for a case of murderous assault being as much too lenient as a long period of penal servitude is too severe for a petty theft. Yet this was the sentence pronounced not long ago in the High Court of Justiciary by the judge whom the writer of the above letter eulogizes as reserving sentences of long periods of penal servitude for perpetrators of crimes of violence. Matters will probably have to be left much as they are at present until we get the long-talked-of codification of our criminal law.—ED. *J. of J.*]

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## Obituary.

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J. COCKBURN CHRISTIE, Esq., W.S.—The death of this gentleman will be noticed with much regret by all those of the profession with whom he came in contact, that is to say, almost the whole body of solicitors. Admitted as a member of the Society of Writers to the Signet in 1838, he subsequently became clerk to Lord Ivory, and on the death of that judge he was appointed an official searcher in the Register House. On the resignation of Mr. Kinloch in 1868 he was made Keeper of the Register of Deeds, and when Mr. George Brown Robertson died in 1873 he was appointed his successor as Deputy-Keeper of Records. Of particularly gentle man-

ners and obliging disposition, his loss will be much felt by the frequenters of the search-room in the Register House, where he discharged his duties till within a few months of his death with great assiduity and acceptance.

WILLIAM HART, Esq., late Procurator-Fiscal, Glasgow.—The death of this gentleman is announced in his eightieth year. To those who have practised in the Glasgow Circuit Court it is needless to recall the familiar figure of Mr. Hart: since his retirement in 1876 his presence has been missed at his wonted place at the table. From the following notice, which we take from the *Glasgow Herald*, it will be observed that Mr. Hart was engaged for a very long period in that branch of the profession which he so adorned. We have before us, as we write, a copy of the memorial to the Treasury referred to below, and amongst the very laudatory letters which are appended to it are one or two which contain some interesting information as to the manner in which the deceased gentleman performed his duties. Lord Deas says in a letter that when he was Advocate-Depute in 1841, he brought ninety-three prisoners to trial at the circuit in January of that year, the precognitions in all these cases having been prepared by Mr. Hart. Of these prisoners fifty-nine were transported, thirty-three were imprisoned, only one escaping by a verdict of not proven. A similar experience occurred to his Lordship in 1848, while in 1847 out of 122 prisoners only two succeeded in escaping from the toils of justice. The principal details of Mr. Hart's career are given in the following notice: "Mr. Hart has of late been in feeble health, and has now gone to his rest full of years and after a useful and honourable career. He was a native of Glasgow, and was born in the first year of the present century. In 1820 Mr. Hart entered the department of Procurator-Fiscal of the Lower Ward of Lanarkshire, his uncle, the late Mr. George Salmond, being then sole procurator-fiscal. He continued actively engaged in the department from that time till 1825, when he was appointed and took charge as principal assistant. In 1846, Mr. Salmond having fallen into delicate health, Mr. Hart was appointed procurator-fiscal, being joined in 1857 by Mr. John Gemmel, now the Stipendiary Magistrate for the city. In 1855, it should be mentioned, a large addition was made to the duties of the office, in consequence of the criminal jurisdiction of the magistrates in the matter of precognition, previously conducted by a separate procurator-fiscal, being abolished and transferred to the Sheriff Court. All through his lengthened tenure of office, Mr. Hart discharged his important duties with painstaking care, and displayed sound judgment and discretion as well as great ability in dealing with the many difficult and intricate cases which came before him. In 1876 he retired from office after forty-nine years' service on behalf of the Crown, and has since lived in retirement. Before resigning he memorialized



the Treasury for an allowance, his application being supported by cordial letters of recommendation from Lords Moncreiff, Deas, Ardmillan, Gifford, and others, but notwithstanding the strength of his case the pension was not granted."

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### The Month.

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*Vaccination Act Amendment Bill.*—"The Vaccination Act Amendment Bill," against which the whole medical profession has so emphatically protested, is very short. It simply provides that "no parent of a child shall be liable to be convicted for neglecting to take, or to cause to be taken, such child to be vaccinated, or for disobedience to any order directing such child to be vaccinated, if either (a) he has been previously adjudged to pay the full penalty of twenty shillings for any of such offences with respect to such child, or (b) he has been previously adjudged to pay any penalty for any of such offences in respect of such child." This clause, as we learn from a perusal of Mr. Fry's introduction to his edition of the Acts, is word for word the same as a clause which was inserted in the Vaccination Bill of 1871—now the Vaccination Act, 1871 (34 and 35 Vict. c. 98)—and passed the House of Commons, but was rejected in the House of Lords by a majority of one. It has its origin in a report of the Select Committee of the House of Commons, which, in reporting upon the Bill of 1871, after pointing out that "the public opinion of the neighbourhood may sympathize with a person prosecuted, and may in consequence be excited against the law, and after all, though the parent be fined or imprisoned, the child may remain unvaccinated, in which case the law can only triumph by the forcible vaccination of the child, could not recommend that a policeman should be empowered to take a baby from its mother to the vaccine station, a measure which could only be justified by extreme necessity," but "would recommend that whenever in any case two penalties or one full penalty have been imposed upon a parent, the magistrates should not impose any further penalty in respect of the same child." We cannot accede to these arguments. The Vaccination Acts of 1867 and 1871 are the deliberate expressions of the will of the Legislature, formed, as Mr. Bruce pointed out to the House of Commons, after an inquiry (instituted by Sir Benjamin Hall three years after the passing of the original Compulsory Act of 1853) "as exhaustive and complete as ingenuity could devise." The only possible amendments appear to be two, either (1) to compulsorily vaccinate a child as soon as the child can be safely detached from its mother for that purpose, or (2) to return to the principle of permissive vaccination, which obtained from 1840, when the first Vaccination Act was passed, to 1853, when vaccination was first made com-

pulsory. The Vaccination Acts are passed for the benefit not of parents, but of their children and of the public; and to allow parents to buy the power of breaking the law by discontinuance of a penalty for a continuing offence is not only entirely without precedent in our statutory law, but a distinct encouragement to an agitation the most fanatical and ignorant in our history.—*Law Times*.

*The late Mr. Serjeant Armstrong.*—In a notice of this distinguished member of the Irish Bar, whose death was recently announced, the *Irish Law Times* relates the following interesting occurrence:—

“It is said that Mr. Armstrong’s latent talents were first discovered by the following incident: ‘It happened at the Wexford Assizes that a little boy was indicted for the murder of a play-fellow, and being in humble life, his friends were without means of employing counsel for his defence. The proof of his guilt depended on circumstantial evidence, but so clear that there was no hope for the boy. He had the brogues that belonged to the murdered boy; he had a knife that was also his, and a ball with which they played. These articles were found with him directly after the murder. Chief Baron Pennefather assigned young Armstrong as counsel to defend the lad. Having read over the informations, he saw what a slender hope there was of saving the boy’s life. So he applied that the trial might be postponed, and the judge assented. During the next assizes in Clonmel he was one day caught in a shower of rain, and taking refuge in a bootmaker’s shop the thought struck him to ask how one pair of boots could be distinguished from another made on the same last, and the bootmaker informed him that identification was impossible, except with regard to the boots on which he was in the habit of putting a private mark. Here was the argument against conviction. Then as to the knife, there were hundreds of the same kind sold by every pedlar. When the assizes came round at Wexford he cross-examined the Crown witnesses with telling effect in reference to the identity of the brogues and the knife. But then there was the ball, and the mother of the murdered boy Moore swore she herself made it, winding it round a piece of crumpled-up brown paper. Surely this was conclusive. Young as he was the little fellow at the bar saw the force of her evidence, and asked to see his counsel. Mr. Armstrong went to the side of the dock and the prisoner whispered in his ear, “I unwound the thread and put it on again on a cork to make the ball hop.” At the close of the evidence for the Crown the case seemed proved to demonstration, in so much that the prosecuting counsel left it in the hands of the judge and jury. But Mr. Armstrong rose, and with great power of analysis sifted the evidence, maintaining that the only real proof was that in reference to the ball—“My client’s life hangs upon a thread, and if it should so happen that the thread is wound on paper, as the unfortunate mother of the youth who was murdered describes, then my case is lost. Let the ball be unwound,

and to you, gentlemen of the jury, I commit my client's safety." The end of the thread was handed to the foreman and amid breathless stillness it was unwound. At last down fell the cork, and a cheer in Court proclaimed the safety of the prisoner, if not his innocence."

*Lord Brougham.*—In an article in the *Westminster Review* on the Life and Times of Lord Brougham, it is said that his first professional business in Scotland was defending prisoners free of charge, who were too poor to pay a lawyer. On the first occasion the judge of assize was Lord Eskgrove, whom Campbell describes as "a foolish old gentleman, of whom ludicrous stories had been told, and upon whom tricks had been played for nearly half a century." At no time in his life did Brougham care to grapple with a strong judge; but on this, his first appearance in Court, he showed the propensity which ever afterwards he exhibited, to take liberties with a weak one. He accordingly perplexed Lord Eskgrove by elaborate arguments, delivered with all his vehemence and force of rhetoric, and with apparent sincerity on such questions as whether, in an indictment for sheep-stealing, it is necessary to state the sex of the stolen animal; whether a man indicted for stealing a pair of boots can be convicted of stealing a pair of half-boots; whether, where a woman made her husband drunk, and he being drunk assaulted her, the woman was not the *causa causans*, or, in the language of Scots law, *art and part*, so as to entitle the husband to the benefit of the maxim "*volenti non fit injuria*." It was not without difficulty that the prosecuting advocate convinced the not very clear-minded judge of the fallacy of Brougham's arguments, and his Lordship gave this utterance to his feelings, "I declare that man Broom or Brougham is the torment of my life." He afterwards, as Cockburn tells us, gave Brougham the name of the Harangue. The general election being over, Brougham found it necessary to turn again to the law. He became a pupil of Mr. Tindal, who was afterwards one of his juniors in the *Queen's* case, and subsequently Chief-Justice of Common Pleas. Here he formed the acquaintance of James Parke, afterwards a Baron of the Exchequer, and Lord Wensleydale. Two men more opposite to each other than Brougham and Parke could not be found—Brougham, brilliant and ambitious, but wanting steadiness and discretion; Parke, slow, plodding, cautious, and persevering. With Brougham, politics, literature, and science shared his energies with the law. To Parke, law was "all in all." We have heard that shortly before his death a lady said to him, "I wonder with your great mind, Baron, you have never written anything." "Written anything!" was the astonished answer, "why, my dear madam, I have written the judgments in the volumes of Meeson and Welsby, and they will remain long after the perishable literature of the present time has passed away."

*Learning to pass Sentence.*—When Judge Manniere was on the circuit bench, says an American paper, a German from one of the interior towns of the country, who had just been elected as justice of the peace, but had never tried a case, came into his court to witness a trial, so that he might know how to proceed when he should be called upon to administer justice. It so happened that he was present during the last day of the celebrated Hopps' murder trial, and heard Judge Manniere sentence Hopps to be hung. About ten days after this his first case came on for trial. It was upon a note of hand, and amounted to \$12.25. Addressing himself to the defendant Haas, he said, "Stand up! What has the prisoner to say why the sentence of the Court should not be pronounced upon him?" The poor defendant, frightened by the solemn manner of the justice, said he had nothing to say. "Then," said the justice, "it is the sentence of the Court that you pay to the plaintiff, John Dedrich, the sum of \$12.25 and \$2.30 costs, and may God Almighty have mercy on your soul!"

*Judicial Behaviour.*—Judicial thinking aloud is one of the vices of our modern judicial system. The vigorous reporter who presents almost *verbatim* in the columns of the *Times* the doings of the Court of Appeal at Westminster, shows very clearly to what arguments in courts of law have been reduced. A running fire of questions from three astute judges is not an ordeal through which any counsel ought to be expected to pass in advocating a client's cause, and we think that the judges of half a century ago would open their eyes with amazement if they could peruse a faithful report of proceedings in any of our courts of law. The minority of judges in the present day have the faculty of listening. The majority utter their thoughts and their criticisms freely as they go along. The consequence must be, that arguments become much inflated without any compensating advantage. The only consolation is that the evil cannot increase in magnitude.—*Law Times*.

*Boring for Water.*—Judge Eastman, of Manchester, related that at one time General Franklin Pierce was opposed to the Hon. Natt Hubbard in some cause in a New Hampshire court. The general's strong point was his influence over a jury, and in a particular case the eyes of every jurymen were suffused with tears by his pathetic pleading. Mr. Hubbard, in a gruff voice, said, in his reply, "Gentlemen of the jury, understand that *I am not boring for water.*" And this opening completely neutralized the effect of the general's eloquence.—*Western Jurist*.

A life of the late Lord Campbell is being prepared for the press by his daughter, the Hon. Mrs. Hardcastle. The work, which will be in two volumes, will contain selections from Lord Campbell's autobiography, as well as from his journals and letters.

# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF FORFAR.

Sheriffs ROBERTSON and MAITLAND HERIOT.

COOK v. RATTRAY.

### *Filiation—Proof—Period of gestation.*

*“Forfar, 30th July 1880.—*The Sheriff-Substitute having considered the proof and whole process, Finds in fact that the pursuer has failed to prove that the defender is the father of her illegitimate child : Finds in law that he is not liable for the inlying expenses and aliment sued for : Therefore assoilzies the defender from the whole conclusions of the petition, and finds him entitled to expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report in the usual way, and decerns.  
ALEX. ROBERTSON.

*“Note.—*On the pursuer's own showing this child was begot five weeks before Martinmas, that is, on or about the 17th of October 1878. It was born ten months after this. The Sheriff-Substitute thinks it cannot be the defender's child.  
A. R.”

*Forfar, 5th August 1880.—*The pursuer appeals to the Sheriff.

D. MACINTOSH, *Agent for pursuer.*

*Forfar, 10th August 1880.—*Transmitted.

*“Forfar, 14th August 1880.—*The Sheriff appoints the pursuer to lodge a reclaiming petition in support of her appeal within eight days, and the defender to answer the same within eight days thereafter.  
F. L. M. HERIOT.”

*“Forfar, 10th September 1880.—*The Sheriff having considered the appeal for the pursuer against the interlocutor of 30th July, along with relative reclaiming petition and answers, and having also considered the record, proof, and whole process, Sustains the said appeal : Recalls the said interlocutor : Finds in fact that the pursuer has proved that the defender is the father of the pursuer's child : Finds in law that he is liable for the same in terms of the conclusions of the libel : Therefore decerns against him for the inlying expenses and aliment as prayed for : Finds the pursuer entitled to expenses : Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.  
FRED. L. MAITLAND HERIOT.”

*“Note.—*This no doubt is a narrow case, but on the whole it seems to the Sheriff that the balance is against the defender. David Rattray (the defender) and Edmond Kettles went to visit Mary Cook (the pursuer) and her fellow-servant Elizabeth Miller. These men arrived late at night. The two women say they arrived about eleven and remained till about twelve. Kettles says it was fully ten when they arrived, and that they left before twelve, while Rattray says they arrived about ten and left about eleven. However this may be it was a late hour before they left, keeping in view that they had two or three miles to go, and be up early to their work next morning. When the men arrived the young women were in bed. The men knocked for them, and they rose to entertain their visitors. The four, however, did not sit together and talk. They separated into two parties. Kettles and Miller went together into the kitchen, and Rattray and Cook retired into the byre. It was then quite dark, and yet they remained an hour together in the dark *solus cum sola*. What were they doing all this time ? It must be held that connection then took place. The Sheriff is at a loss to discover what other object the defender



had for his visit, and as to that part of the case there seems to be little or no difficulty. Any peculiarity there is in the case is as to length of time that is said to have elapsed between the conception and the birth. There is no doubt some difference as to the exact date of the above visit. Kettles would place it so early as six weeks and two days before Martinmas, Cook names it as 'five weeks before Martinmas,' Miller as 'four or five weeks before Martinmas,' and Rattray as 'shortly before the term of Martinmas.' There is no precise agreement between any of the parties as to this date. The Sheriff is inclined to think that Kettles is stretching a point in favour of his friend. If it were five weeks before Martinmas, it would be 305 days after conception; if four weeks, 298 days; and if only shortly before Martinmas, it might be 287. Had it been even quite fixed that 305 days was the right period of gestation, the Sheriff is doubtful if he would have been entitled to go farther than the Court of Session did in the case of *Boyd* (17th June 1843, 5 D. 1213). But as it is not fixed that an interval of 305 days must have intervened, and which interval may have as few as 287 to 290 days, the Sheriff is of opinion that in the circumstances the pursuer is entitled to prevail. F. L. M. H."

Act.—D. Macintosh.—Alt.—MacHardy.

## Notes of English, American, and Colonial Cases.

ARBITRATION.—*Validity and effect of agreement to refer*—*Pure question of law*—*Application for leave to revoke submission*.—A contract entered into between the plaintiffs and defendants for the purchase of some wheat contained the following clause: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two London corn-factors respectively chosen, whose decision shall be final and binding:"—*Held*, that the clause in question formed part of the consideration for the contract, and was intended to include questions of law as well as of fact which might arise upon the construction of the contract.—*Forwood & Co. v. Watney*, 49 L. J. Rep. Q. B. 447.

MARINE INSURANCE.—*Stranding*.—Cargo was insured by a policy containing a warranty of freedom from average "unless the ship was stranded." The voyage was to a tidal harbour, where the ship must necessarily take the ground at every tide, and could only reach the quay at high spring tides. She grounded before reaching the quay on a small bank, and on the tide falling she settled down by the head into a hole, and the cargo was damaged. The bank and hole were caused by steamers going out at low tide, and their existence was previously unknown:—*Held*, affirming the judgment of Field, J., that the ship having grounded from an unusual cause, not necessarily incident to the navigation, had been stranded within the meaning of the policy, and that the underwriters were liable for an average loss.—*Letchford v. Oldham* (App.), 49 L. J. Rep. Q. B. 458.

MUNICIPAL ELECTIONS.—*Form*—*Nomination paper*—*Number on burgess roll of subscribing burgess*—*Ballot Act*.—In the nomination paper of a candidate for the office of town councillor of a borough under the Municipal Elections Act, 1875, the register number of the seconder was inserted as 695 instead of 704:—*Held*, an insufficient compliance with the note to schedule 1, form 2, by which "the number on the burgess roll of the burgess subscribing" is to be affixed, and that the nomination paper was therefore invalid.—*Gothard v. Clarke*, 49 L. J. Rep. Q. B. 474.

Section 13 of the Ballot Act, 1872, by which no election shall be declared invalid by reason of any mistake in the use of the forms, has no application to the decision of the returning officer on the validity of the nomination papers.—*Ibid.*

# THE JOURNAL OF JURISPRUDENCE

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## CONSENT AND CONCURRENCE.

IN this glorious and free country there is no doubt that freedom of thought and of expression extends to the judicial bench. In fact the right of dissent may be said to be freely exercised in the Court of Session, and we have a remarkable instance of it in the recent decision of the Second Division, *M'Ritchie's Trustees v. Hislop* (December 17, 1879, 7 Rettie, 384). This was an application by the feuar of No. 5 Gayfield Square for interdict against the erection of buildings by the feuar of No. 2 Gayfield Square on his feu, on the ground that these buildings were in violation of the conditions of the feu-right of No. 2, which had been granted by the same superior as had granted the feu of No. 5, and all the other feus in Gayfield Square. The respondent did not dispute that the buildings were against the terms of his charter, but he said (1) that his co-feuar had no title to object, and (2) that these conditions as to building had been waived or discharged by frequent violations. Lord Rutherford Clark (Ordinary) held (1) that as the feu-contracts contained similar, though not identical, conditions apparently inserted for the joint behoof of the feuars, these conditions were enforceable by the complainer against the respondent; (2) that the violations which had occurred were partly of a different kind from those now objected to, and partly such as the complainer could not have objected to. We do not at present desire to comment on the rapid extension which the law of building restrictions is receiving from such cases as *Dalrymple v. Herdman* (5 Rettie, 847) and the present (see *Journal of Jurisprudence*, vol. xxii. p. 535). There was a difference of opinion on the first point in the Inner House. But the point we desire to notice is this. On a reclaiming note to the Second Division it was stated by the counsel for the complainers that they did not represent the superior, although the note of interdict bore to be presented with the consent and concurrence of the superior, the superior being

required to give or to complete the title to sue, and the interest of the vassal being clear. On these facts a remarkable variety of opinion was disclosed in the Inner House. Lord Gifford held that the superior was really a party, because his purpose in giving his consent was that the vassals might be entitled to try a question which without that consent they had no legal title to try. His Lordship proceeded on the analogy of consent given to the disposition of heritage or to a deed of discharge. He thought "concur" was a stronger word than consent, and that the words "and they for their interest" would have placed the matter beyond doubt. As regards this judgment it must be said—(1) While the purpose of the superior is clear enough, the question is whether there is anything in the position of a superior which enables him to defeat the ordinary rule that an action must be brought by the person legally interested to bring it, and not by another person. (2) There is no doubt that, as Lord Kilkerran said in the leading case of *Buchan v. Cockburn* (1 Ross, Leading Cases, 36), "a proprietor of land consenting to a disposition *a non domino* implies a conveyance by the *dominus*," although Baron Hume in his observations on the case of *Mounsey* (Decisions, 237) raises the question doubtfully whether it amounts to more than personal bar, and would be conclusive in a question with the *bona fide* onerous disponee of the *verus dominus* after infeftment. Baron Hume's doubt has probably been laid aside by subsequent conveyancers, but the practice is certainly "to make all persons who are or claim to be proprietors concur in the deed as principals, granting not only the dispositive, but likewise all the executive, clauses with joint consent and assent" (Bell, Conveyancing, i. 546). The consent does not imply more than a conveyance of the consenter's right, *tantum et tale*, and the warrandice prestable by a consenter has never been carried beyond simple warrandice, i.e. an obligation not to derogate from the deed to which he has consented. It is not clear what analogy Lord Gifford supposes to exist between a consent to the disposition of heritage and a consent to an action. There is no rule against the lieges conveying their heritages, but there is a stringent and salutary rule against their conveying their rights of action. If there were any analogy it would break down, for the law does not seem perfectly settled that a consenter is a disponent, to all effects; indeed it seems settled that he does not warrant. The ordinary occasion of a consenter being joined in a disposition (where the disponent himself is *sui juris*) is that it is uncertain whether on a previous occasion the consenter transferred, as he intended to transfer, his whole right to the principal disponent. It is impossible to trace the faintest resemblance between such a case and an arrangement by which one party, having a right of action, seeks, without using it himself, to bolster up the want of such right in another. It must be perfectly obvious that in every case, if the conveyance is properly framed, the more substantial and im-

portant right is in the principal granter and not in the consenter, else their positions would be reversed. Now, the condition on which the reasoning of Lord Gifford proceeds is that the principal complainer has no right, or his whole right proceeds from the consent of another party. (3) The case of the discharge is still more puzzling. The consent is given there generally for formal conveyancing reasons. It is where the title of the real creditor is not complete. It does not extend beyond the debt vested in the principal granter of the deed of discharge, and it really amounts to an agreement not to claim what the consenter has already parted with. It does not extend to a debt vested in the consenter, and with which the principal granter has no connection. That would be a very extraordinary extension of the doctrine of consent in discharges, and yet that alone would furnish the semblance of an analogy to the point pleaded in *M'Ritchie's Trustees v. Hislop*. If there was an original and separate debt, it would be bad conveyancing to discharge that by way of consent to the discharge of another debt by another creditor; and even were the conveyancing not bad, the discharge would be operated by the consent given, and not by the transfer of any right to the principal granter. (4) The difference between "consent and concurrence" seems more a point of grammar than of law, and in the classical sense concurrence means anything but consent. As regards the introduction of the words "they for their interest," it must be remembered that the question before the Court in *M'Ritchie's Trustees v. Hislop* was not one of phraseology, but of fact, viz. what parties were before the Court. There was no appearance for the superior, and therefore it could only be in some inaccurate or figurative sense that he could be said to be a party; for instance, that having by consent transferred his right of action to his vassal, he would remain bound (and presumably all the vassals not parties to the action would be bound by a judgment against the superior, or against the vassal with whom the superior concurred) by judgment in the case. That is the view taken by Lord Justice-Clerk Moncreiff, who on this point agreed with Lord Gifford. "He, as well as the feuars, would be conclusively bound by the judgment to be pronounced." The Lord Justice-Clerk apparently admits that in the ordinary case of unconnected parties the consent of A. would not enable B. to sue on A.'s right. He says, "There are many instances in which one party has the primary and another a subordinate and derivative title to enforce the same right, such as landlord and tenant, truster and trustee, creditor in possession and fiar, and suchlike, in which the concurrence of the holder of the radical right will competently validate and fortify the right of action in the holder of the derivative right. . . . The case of superior and vassal is a simple illustration of this form of procedure." This is somewhat bewildering, for it introduces a class of considerations totally different from those alluded to by Lord Gifford. There are no doubt cases in which

parties have different and more or less extensive rights in the same subject, and where both may be entitled to bring a more comprehensive action for the vindication of their combined rights than either could alone. That is the proper case of suing together, and it has no application to the case of *M'Ritchie's Trustees*. There are also many cases in which a plea of want of title may be met by the concurrence of a party, not formally joined as a pursuer, who is bound to support the defective title of the pursuer. These are rules of pleading intended to secure the final and complete settlement of a dispute in the process before the Court. But in every case this assumes the substantial legal interest in the person whose action is consented to and concurred in, which is precisely the element admitted not to exist in *M'Ritchie's Trustees*. It may be accurate in some cases to call the pursuer's right derivative. Most rights have been acquired from some one else. But the judgment of the Lord Justice-Clerk clearly assumes a right of action to exist, else how could it be validated and fortified? Take the case of landlord and tenant. The analogy to *M'Ritchie's Trustees* would arise if one tenant tried to declare the irritancy in the tack of another. Could such an action proceed at the tenant's instance with the concurrence of the trustee? Surely not, unless all the rules of process are to be set aside. The Lord Justice-Clerk intimates that he might take a different view if "this had been a suit by two separate and independent parties having distinct rights and interests in the subject-matter of the suit." This is also very perplexing. In that case each party would no doubt vindicate his distinct right, and, it is admitted, could not vindicate the right of the other with or without consent. Parties must plead for themselves. But *M'Ritchie's* case was unfavourably distinguished from that now put by the fact that, on the hypothesis of this part of the judgment, there was no right, distinct or indistinct, in the feuar, but that the right was created by the consent of the superior. If this was not the hypothesis of the judgment, the necessary conclusion would be that there were in these building-feu contracts three classes of stipulations—(1) those enforceable by either superior or vassal separately, and of course together; (2) those enforceable by the superior but not by the vassal; and (3) those enforceable by the vassal, provided the superior concurred and consented. These criticisms are very much a paraphrase of the judgment delivered by Lord Young in *M'Ritchie's Trustees*, in which he dissented from the other judges, and held that consent and concurrence were not sufficient to introduce the superior's title to the action, but that the superior must appear. The majority of the judges say, although there is certainly no decision to that effect, that the superior concurring would be bound by the judgment. This would certainly be a proper inference from their decision. They do not say that the superior concurring would be liable in expenses. This would also be a proper inference, although it is not



so decided. But apart from these collateral questions, the simple point is that the party whose right the Court is called on to affirm or deny must be present in Court to look after his own interests and to answer questions by the Court, and he is not entitled to get a neighbour, or a person bound to him by contract, or having some similar or subordinate interest, or no legal interest at all, in the subject-matter of the action, to plead for him, though he concurs. As Lord Young says, "a right of action cannot be transferred or communicated while the substantial right in respect of which it exists is retained. It is a fixed rule of law that a party who seeks judicially to vindicate his rights shall do so in his own name and at his own instance." This we consider to be very plainly the law of Scotland, and it is matter of regret that Lord Gifford should denounce so wholesome, and indeed fundamental, a rule as a "mere technicality." It seems to us to be involved in the notion of an orderly judicial proceeding. Lord Gifford said that "as matter of justice and fair play," if the superior was not a party by virtue of his consent, though he did not appear, the vassal might amend under the Court of Session Act, 1868, sec. 29, so that the real question between the parties might be determined. This we hold to be entirely contrary not only to the terms of the Act of 1868, but to the decisions given upon section 29. It is settled law that you cannot join new parties by amending. How could the vassal sist the superior by an amendment of his record; and how could the Court allow a person to amend who was not a party to the action? If the real question was between the two vassals, why should the superior be sisted?

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### JUS QUÆSITUM TERTIO.

WHAT is *jus quæsitum tertio*? The main interest of this question has arisen in connection with one or two recent cases on building restrictions. In *M'Ritchie's Trustees v. Hislop* (December 17, 1879, 7 Rettie, 384), to which we have already alluded in this Journal as disclosing a serious difference of opinion among the judges on a very elementary point in the law of procedure, there was also a pointed dissent on the principle of law to which the right of a feuar to insist on the observance by his co-feuar of restrictions imposed by one superior on both must be referred. In that case Lord Young states the principle thus: "The feuars, although they do not directly contract with each other, nevertheless all contract with the same superior and to the same end in which they are all alike interested, viz. the creation and maintenance of a street or square on a particular plan, and it is reasonable to impute to each the knowledge that the others contract in reliance on his obligations.

Express reference to a plan, or the sameness or similarity of the obligations imposed on each feuar, may not be, and I think is not, necessarily conclusive, but is nevertheless always a strong ground for implying that the feuars intended to be bound *inter se* to execute and maintain a common design. Whether they did so or not is always the question for decision according to the facts and circumstances of the individual case." And he also says, "The doctrine of *jus quæsitum tertio* has been appealed to, but as the *jus quod est quæsitum* in every such case is the species of *jus* which is denominated servitude, I think it better to consider the matter with reference to the law of servitude." To the opposite effect Lord Justice-Clerk Moncreiff says, "It is not in my opinion a right of servitude in any sense. The *dominium directum* is not a dominant tenement in any legal acceptation. The restriction is a feudal condition, and except on the footing of communication of the superior's right, that is *jus quæsitum tertio*, that of the feuars could not be, and I am not aware that it has ever been, sustained." Is this difference verbal or real? Probably these two eminent judges would look at the stipulations of any particular feu-contract, or set of feu-contracts, much in the same way. But there seems to be a fundamental difference in the general doctrines they enunciate. Nothing turns on the use of the word "servitude," although in nearly all the important cases on this subject the language of the law of servitude is used. It is rightly used to describe the character of the right once constituted. The most common building restriction is that *non altius tollendi*, and this is the most common of urban servitudes. The dominant tenement must be all the feus given off according to the plan or with the same conditions, except the feu with regard to which the question arises. No doubt the superior has his personal and direct obligation. But in substance this does not go beyond a power to protect the feus; because, according to the doctrine of *Dalrymple v. Herdman*, the superior cannot defeat the right of one vassal by discharging the obligation of another; and, on the other hand, if such a discharge had been acted on, clearly, on the principles of mutual contract, the superior could not insist on performance of the obligation by any vassal. And the servient tenement is the feu with regard to which the question arises or may arise; each feu considered in relation to all the others. The use of the word servitude does not imply that the right was constituted in any particular manner. It cannot be supposed that its use in *M'Ritchie's Trustees* implies that the right was constituted by direct grant or agreement between each feuar and all the others, between the proprietors of the dominant and servient tenements, as above defined. All the judges are at one that there is no express agreement or obligation entered into. On each feu the restriction is imposed by the superior's charter or feu disposition or contract, to which nobody is a party but the superior and the vassal who receives it. What the superior's writ imposes

is in terms only the direct obligation prestable by the vassal and his successors to the superior, but on whatever legal principle the right of the co-feuar in certain circumstances may be said to depend, it is convenient to regard that right as coming into existence along with the delivery of the superior's charter, because, as the co-feuars never come together, there is no other point of time to take. Leaving, therefore, the question of servitude aside (its chief importance being perhaps that the *nature* of the restriction itself must always very largely affect the question whether the co-feuars may enforce it, new and fantastic restrictions not being likely to find much favour from the Court), we find that the Lord Justice-Clerk calls the building restriction a feudal condition. This is quite true if it be confined to the direct obligation between superior and vassal, but no one disputes the validity of the feudal condition against the vassal and his singular successors. The law wisely gives a very sparing recognition to perpetual burdens on property, and the loosening of the relation between superior and vassal has probably in the meantime (until new doctrines spring up) made it still more difficult to impose these. But it would be absurd to describe the right of the co-feuar as a feudal condition; which must be a condition of the superior's act in renewing the investiture, or now in receiving payment of his casualty. Accordingly this is not the meaning of the Lord Justice-Clerk, because he proceeds to transfer the feudal condition to the co-feuar by the principle of *jus quæsitum tertio*. This, however, seems impossible; and for the same reason, that a feudal condition can exist only between a superior and a vassal. No doubt the obligation which it is the object of the feudal condition to enforce is supposed to have been stipulated by the superior, not only for himself, but also for the co-feuars. Similarly in certain cases the vassal is supposed to have stipulated (sometimes this is expressly done) that similar or identical conditions shall be imposed on all the co-feuars. If such a stipulation were made by the superior expressly on behalf of the co-feuars, there would certainly be room for the application of what is generally understood as the principle of *jus quæsitum tertio*, though in each case, of course, it would be a question of circumstances whether any third party had acquired a right. But does this principle properly apply where no express stipulation has been made? This question requires a sketch of the history of decisions on the subject.

The use of a legal phrase in Morison's Dictionary, if it be consistent, ought to fix its proper use in Scottish law. In the Dictionary there are only twenty-two decisions reported on *jus quæsitum tertio*, extending from 1591 to 1759 (M. 7719 to 7745). In *Wood v. Moncur* there was an express clause in a contract of excambion in favour of the tenants of the land excambed and against their removal. The Lords found that the provision might be kept to the tacksman. In *Renton v. Acton* there was a bond given by A. to B. and C., from whom A. acquired right to certain teinds, that A. would

never exact more than a certain amount in name of teind from D. D. defended herself on this bond. The pursuer argued with great vigour and condensation "that this bond containing the said clause could not defend her, the said clause being conceived in favour of a third party, who was neither present at the time of the parties contracting thereon, she not being a party, nor knowing anything of the bargain, and doing nothing upon it, nor being accepted by her, nor by none in her name, and so behoved to be unprofitable to her, being *stipulatio alteri facta*, which is not profitable in law." But the Court held that as the bond had been registered, this was equivalent to delivery in favour of the third party, and sustained the defence on the bond. In *Irving v. Forbes*, which is very shortly reported, A. granted a bond to B. in which he declared C. to be free from a certain cautionary obligation. The Court found that the clause, though in a writ betwixt two other parties, was valid in favour of this third party, and that the not delivery or acceptance was provable only by his oath. The relations of parties in this case are obscure, and it is not clear whether delivery to the party to the writ, or a separate delivery to the third party, was in question. If the writ was not delivered to the principal party, of course no question as to the rights of the third party could possibly arise. In *Pitmedden v. Gordon* there was an express obligation in a trust-deed to denude in favour of creditors named in a list. In *Warnock v. Murdoch* there was an express provision in a marriage-contract of an annuity to a person who was not a party to the contract. The granter of the annuity had attempted to discharge it by his settlement, but it was found that the annuitant had still right, although it is clear from the report that there had been no special delivery of the marriage-contract to her or on her behalf. The authority of Lord Stair (i. 10, 5) is there given for the following statement of the law in argument: "When a right in favour of a third party is expressed in a contract between two persons, the right is effectual to that third party, though not present nor accepting, and it cannot be recalled; but that third party may compel either of the contractors to exhibit the contract and thereafter may insist for performance." The decisions in the second section of this title in the Dictionary relating to "delivery for behoof of a third party" are not quite in point, for the heading of the section is not quite accurate, the right in most of the cases reported being in favour of the third party, who was absent or ignorant, and delivery being made to somebody on his behalf. The third section of the title, "Clauses in deeds in favour of third parties," is more in point. In *Nimmo's* case the persons to whom a purchaser was taken bound to pay the price were found entitled, though not subscribing the contract, to use inhibition against the purchaser. This is otherwise expressed in the case of *Ogilvie v. Ker*, "the clause in favour of the third party is not a simple mandate, but a delegation;" the third party there being a creditor of the creditor in the

contract. The fourth section, "Among third parties having an interest, who is preferable?" seems to have little connection with the main subject of the title. The subject is taken up again under the extremely comprehensive title Presumption (M. 11493-11508). Sec. 8 deals with "rights taken in name of third parties not delivered." In *Bayne's* case, the most important of the section, the judgment of the Court is as follows: "A bond taken in name of a creditor was not presumed to be in trust for behoof of the procurer of the bond, but in security to that creditor, and could not be warrantably given up by the procurer of the bond, or affected by his debt, although it was not delivered to the creditor in whose name it was taken." It is unnecessary to do more than refer to sec. 9, which contains the leading case of *Trotters v. Lundy*, and other cases dealing chiefly with the effect of delivery, actual or implied, upon rights taken in name of children. The general result of the cases in these titles of the Dictionary is that *jus quæsitum tertio* is applied to the case of an express clause in favour of a third party in a contract or settlement or unilateral obligation; and that whether or not there must be special delivery to or on behalf of the third party, or its equivalent, depends very much on the relation between the party creditor and the third party. The delivery would prove the intention of the contracting parties to benefit the *tertius*. It might be conjectured from *Renton v. Aiton* that where there was no previous relation between the party contractor, who stipulates, and the *tertius*, delivery might in such a case be required not as a rigid solemnity, but as supplying evidence of intention, of which, from the relations of the parties, no other evidence was forthcoming. Again, a distinction might be taken between contracts and onerous unilateral obligations on the one hand, and settlements, to which third parties are introduced by way of bounty, on the other. The settlements, however, on which such questions arise (see *Wightman v. Costine*, 5 Rettie, 782, and 6 Rettie, 13) generally contain an element of contract, and indeed the expression third party has no proper meaning apart from contract.

The celebrated passage where Lord Stair says that the *jus quæsitum tertio*, defined very much as the cases in the Dictionary represent it, is an opinion of Molina, and "quadrates with our custom," was before the House of Lords in *Finnie v. Glasgow and South-Western Railway Company*, 13th August 1857. No decision was given on the principle of *jus quæsitum tertio*, because it was held that the agreement between the railway companies in that case, on which the pursuer (a trader) founded, did not bear the construction he put upon it, and therefore the question of his right to enforce it did not arise. But observations were made on the principle. The Lord Chancellor said, "The *jus quæsitum* must be not merely a *jus* in which the *tertius* is interested, but it must be a *jus* which was intended to be beneficial in some way to a third person." Accordingly, as the House held that the object of the



agreement in *Finnie's* case was simply to make an arrangement between the two railway companies, and there was no intention to benefit mineral lessees, though they would profit by the reduction of rates agreed to, the action was thrown out. Lord Wensleydale, commenting on the words of Lord Stair, says, "It is not necessary, I think, that the stipulation should be in favour of a named party (though the instances given in the decisions are such), for I conceive that if the party or parties are sufficiently described, and the stipulation is clearly meant to be in his or their favour, it will be enough to entitle the person or persons so described to sue." And he again speaks of an "agreement that something is to be done or permitted for the benefit of a third person clearly ascertained." The same doctrine was considered by the same learned Law Lords earlier in the same session of Parliament in *Peddie v. Brown, Gordon, & Company*, June 11, 1857. There a tenant had obtained a large sum of compensation money for his interest in some land taken from the farm and for damage to business, and in consideration of his undertaking to construct a branch railway, which he failed to do, he having terminated the lease shortly afterwards under a clause of "workability to profit." It was held that the landlord had no right or interest to sue the railway company on this contract of the tenant. The observations of the Court are precisely to the same effect as in *Finnie's* case, the Lord Chancellor observing that the *jus quæsitum tertio* is also a doctrine of English law, as in *Synnot v. Simpson* (5 H. L. Cases). Among more recent cases in Scotland may be mentioned *Gilpin v. Martin* (7 M. 807), where a father took a disposition of land to himself and his three daughters *nominatim* and their heirs, and after a lengthened possession, but without infeftment, the father was found not entitled to dispoise the estate to others, although there had been no special delivery to the children. In *Allan v. Kerr* (8 M. 34) the element of antenuptial trust for children comes in; and this, or the element of mutual settlement by spouses, also appears in the cases of *Lord Glasgow* (11 M. 218), *Mitchell* (4 Rettie, 800), and *Gibson* (4 Rettie, 867). The most important of modern cases for our present purpose, however, is another case of building restrictions, viz. *M'Gibbon v. Rankin*, January 19, 1871. It was a case in which the superior not only inserted an obligation *non altius tollendi* in the titles of each house in a new street, feued off according to a plan, but in each title bound himself to insert the restriction in all the other titles. The Court held that in such a case the co-feuars were entitled to enforce the restrictions against one another, because each feuar had relied on the restriction entering the title of his neighbours. Lord Ardmillan said, "I do not mean that such mutuality would arise in regard to all minute stipulations, or even to all conditions and provisions, if not truly of the nature of a servitude." Lord Kinloch said, "I do not consider it essential in such a case that the title-deed should contain an

express declaration: that the obligation come under by one should operate in favour of all. The circumstances of the case may speak as strongly as the most express declaration." And then he makes an observation which we humbly think is displaced by the foregoing narrative of cases, and by the observations of the Law Lords in the cases of *Finnie* and *Peddie*. "The normal application of the doctrine is in the case in which no express contract in favour of the third party occurs, but where his right emerges out of the nature of the stipulations between the actually contracting parties." No statement could be made more entirely contradicted by the history of the decisions on this subject. Lord Deas said, "The result of all the decisions seems to me to be that the right and title of one feuar to enforce the restrictions against another must be found in the title-deeds of both, either expressly or by clear and necessary inference. If the restrictions were inserted in the title of one feuar with a declaration that they were so inserted for the benefit of another, I do not mean to say that this other might not enforce the restrictions, although not a direct party to the deed. *That would be a proper instance of the jus quæsitum tertio.* But that is not what we have here. What I think we have here is a case of mutual contract necessarily implied in the terms of the title-deeds. . . . I think there was an implied contract between the defender's author and the superior to the effect that the former should submit to the enforcement of that prohibition by the adjoining feuars, provided the superior took these feuars bound in similar terms, which he accordingly did." There can be no doubt of the historical accuracy of the statement we have underlined. But although *jus quæsitum tertio* has been applied only in cases where an express clause was conceived in favour of the *tertius*, either naming or clearly identifying him, it has not appeared from our review of the cases that the question whether or not the right had been acquired by the third party was decided solely by reference to the deed, and without regard to many facts and circumstances outside the deed. The Lord President says in *M'Gibbon's* case, "It is in respect of the condition of the titles, the mutual obligations they contain, the nature of the properties, and the relations of the various proprietors to one another, that I find sufficient for the application of the principle of *jus quæsitum tertio*." This is probably a sounder view of the substantial question than is taken by Lord Deas, who confines his view to the titles. But although the name of the doctrine is one of elastic signification, it seems clear that while the express declaration suggested by Lord Deas would bring the case under the scope of the previous decisions, on no view could this be said where the express declaration was that several third parties (all the co-feuars) should not receive a certain benefit, but be placed under a certain restriction. The only way, in fact, of applying, or rather extending to the ordinary case of building restriction the recognised principle of *jus quæsitum tertio* would be by supposing

that the restriction imposed on each feuar by the superior was tacitly stipulated by the superior in favour of all the other feuars. But this would be going the whole difference between an express and a tacit stipulation, although otherwise it might in certain cases come under the previously established principle that it is sufficient if the *tertius* can be clearly ascertained from the terms of the deed. It is quite clear that another *ratio* of decision stated by a former Lord President in *Cockburn v. Wallace*, 1st July 1825, cannot now be supported, viz. "Each of the feuars becomes my [the superior's] singular successor in the right of servitude for which I have stipulated." This has often been repudiated by eminent judges. The last case to be noted at present is that of *Blumer & Co. v. Scott*, January 16, 1874. In that case the purchasers of a steamship contracted with the makers that the engines should be supplied by one of two firms to their (the buyers') satisfaction. The makers (sellers) made the contract with one of these firms, who failed to implement; and it was held that the purchasers of the steamship had no right of action against the defaulting firm of engineers either under their own contract or on the ground of *jus quæsitum tertio* arising out of the sub-contract between the sellers and the engineers. In this case Lord Ardmillan gives the following statement of the law: "According to Lord Stair, it is only where there is in a contract 'some article in favour of a third party' which cannot be recalled by one or both of the contractors, that there is a *jus quæsitum tertio*, and this doctrine is specially recognised and approved of by Lord Cranworth and Lord Wensleydale. The right may truly be conceived in favour of a third party, and may therefore be enforced by that third party, although he be not named in the contract; but the stipulation of which the benefit can thus be transferred to him must rest on an agreement between the contracting parties—that the stipulation shall be performed in favour and to the satisfaction of the third party. Even if not named, the third party may be entitled to adopt the agreement and enforce it by action. But in such a case it must be clear that both the contracting parties meant so to secure him, and that they could not separately or together revoke the stipulation. If not named he must at least be described, and it must be clearly apparent that the stipulation was intended to be in reference to him and for his benefit." However the judges may differ in applying the principle to cases of building restriction, there seems to be little difference among them about its general statement. In *Wightman v. Costine*, for instance, Lord Gifford says, "*Jus quæsitum* only arises to a stranger or third party when one of the contracting parties to the deed stipulates or contracts on behalf of the stranger." In this case it may be mentioned that Lords Curriehill and Ormidale proceeded to some extent on the delivery of certain deeds to trustees, the registration of a bond in the Register of Sasines, and the consent of the party repudiating to a declaration of trust being recorded in

the Books of Council and Session. These facts along with others they held to make a certain destination irrevocable, but the majority of the Second Division recalled on the ground that no consideration had passed, and the protection of the destination had not formed the subject of contract. And the Lord Chancellor says very shortly, "There is no appearance of any agreement, any family arrangement, any new contract between him and his father, and that observation seems to me to put an end to one part of the argument that there was here a *jus quæsitum* to third parties; that, of course, could only arise if there was some agreement between the father and son for the benefit of third parties."

Having thus taken a rapid glance at the state of the authorities on the subject, we are in a position to consider whether there is really a difference of principle in the views taken by Lord Moncreiff and Lord Young in the case of *M'Ritchie's Trustees*. We think there is, although it may be difficult to state it in precise terms. The view of Lord Young apparently is that you must read the title and consider the circumstances in which it was granted, and if the fair inference is that the feuars intended to be bound *inter se*, you must draw that inference to the effect of constituting reciprocal servitudes over each feu in relation to all the others. The view of the Lord Justice-Clerk, on the other hand, seems to be that a right which the vassal first gives expressly or tacitly to the superior, is afterwards, by the operation of a legal principle, transferred or communicated to the co-feuar. It may be that in practical result the two views are the same, but the first seems less artificial than the second. As regards *jus quæsitum tertio*, it is impossible to state the doctrine with any approach to definite accuracy. The case of the third party being a creditor of the contractor who stipulates for him is obviously different from other cases, but it must remain in all cases a question of intention on the facts, although particular sets of facts may give very strong presumptions in favour of intention.

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## STATUTES AFFECTING SCOTLAND.

If the statutes affecting Scotland passed during the present year have been few in number, they have been far from unimportant. Several, indeed, have effected great changes in our law. Hypothec will no longer as formerly enter into every case of landlord and tenant, the threats of imprisonment for debt will no longer hang over every poverty-stricken wretch, and hares and rabbits have for ever lost legislative protection. Dating from the year of grace 1880, a new race of farmers will spring up, in whose eyes a hare will be no more sacred than a rat, to whom an hypothec will mean

as little as an hypothesis, and who will never cross the threshold of the county jail.

The first statute which falls to be noted is the "Hypothec Abolition Act of 1880" (43 Vict. c. 12). As an article upon this Act has already appeared in our columns, it may be very briefly noticed here. Had it been called the "Hypothec Amendment Act," the title would more correctly have described what it effects. For as urban hypothec still exists, and very small farms or crofts are still exempted, the *abolition* of hypothec can hardly be said to have as yet taken place. Moreover, the Act is as important for what it introduces as for what it takes away. For a number of years to come farms will be divided into two classes, viz. those under old leases (current at present) still subject to hypothec, but to the tenants of which the Act of Sederunt 1756 still applies; and those upon which the tenants are indeed freed from hypothec, but subject to more stringent provisions relating to unpaid rent and removal.

Amongst the first Acts passed by the new Parliament was one for the appointment of judicial factors in the Sheriff Courts, the "Judicial Factors (Scotland) Act, 1880" (43 and 44 Vict. c. 4). While this Act was a bill passing through Parliament, it was reported upon by committees both of the Faculty of Advocates and the Sheriffs of Scotland. The Faculty disapproved of the bill apparently by a majority, and in the report of their committee certain formidable objections both to its principle and details are pointed out. That report raises the question whether, for the purpose of securing a slight saving in expense, it is worth while transferring what has hitherto formed part of that mysterious *nobile officium* of the Supreme Court to inferior judges and their tribunals. The Faculty seem to admit that there might be a saving of some expense. But the Sheriffs do not even go this length, for they say that they are of opinion "that this increase of their jurisdiction is not called for by any evils or inconveniences that at present exist, that no saving of expense would result from this legislation." These learned gentlemen state that in their Courts such appointments would cost about £7, and in the Court of Session £10; but that as printing and fee-fund dues might be easily dispensed with, the expenses in the latter might be reduced £3, 10s. or so. Certainly for a matter of 10s. any change of Court would be unnecessary. But we cannot help expressing a doubt as to the accuracy of these estimates. Petitions for such appointments are drawn, as a rule, in the agent's office, and in addition to his fees, some three guineas go to the counsel, and sundry smaller sums to his clerks. If the Sheriffs had suggested that counsel might be dispensed with, we could have better understood their calculations. Then they only take the case of unopposed applications. We rather imagine that in cases which are opposed the expense of Court of Session proceedings would considerably exceed that of those in the Sheriff Courts.



The Act commences on 1st January 1881. From and after that date Sheriffs may appoint judicial factors when the estate to be administered (heritable and moveable taken together) does not exceed the yearly value of £100. The clause provides that "every Sheriff and Sheriff-Substitute respectively shall have and may exercise over and with regard to judicial factors appointed in the Sheriff Court" the same power which the Court of Session has in the case of its appointments. In the Faculty's report it is pointed out that this section "seems, contrary it may be supposed to the intentions of the framer, to give any Sheriff or Sheriff-Substitute in Scotland power and authority over a factor appointed by any other." It certainly would have been better to substitute "appointed by them" for "appointed in the Sheriff Court." But no practical difficulty can arise. Sub-section 1 of section 4 fixes the Court in which the application for appointment is to be made, viz. that to the jurisdiction of which the pupil or insane person is subject. Before making such appointments the Sheriff has to be satisfied by reasonable evidence that the estate does not exceed the statutory limits, but having once decided this point, his decision upon it is final.

Upon the matter of appeals the Act is certainly not very clear. Under sub-section 5 it is provided that in all cases where appeal would be competent from the Lord Ordinary to the Inner House, there shall be an appeal from Sheriff-Substitute to Sheriff. The Faculty committee remark, "Further appeal is neither allowed nor prohibited." We should certainly doubt its competency. The Sheriff is to take the place of the Inner House. But under sub-section 9 it is left optional to a person applying for the recall of any appointment under this Act to go either to the Sheriff or the Court of Session. But apparently he cannot go first to the one and then to the other, because sub-section 10 makes both the decision of the Sheriff and that of the Court of Session final. This is certainly somewhat anomalous. In other cases when the Sheriff gives the final judgment, appeal to the Supreme Court is expressly excluded. In a general sweeping way the proceedings at present taken before the Lord Ordinary are directed to be taken in the Sheriff Court. Difficulties, it is feared by some, may arise when the Act comes into force. The Sheriffs are considerably alarmed, and point out that Sheriff-Substitutes are not acquainted with the Outer House code. It is true that a small and steadily diminishing minority of these gentlemen are not advocates, and that some of those who are can hardly be expected to remember the very appearance of a Lord Ordinary. But have they not the Sheriffs themselves to keep matters right? They have been forced by Act of Parliament to tread the boards of the Parliament House for many a weary year, and all have had opportunities at least of witnessing from the side benches what took place at the bar.

An amusing mistake in the bill, which did excite the indignation and satire of the Sheriffs, has been corrected in the Act. Under

sub-section 5 it was originally provided that when the accountant of Court was bound to make a report to the Lord Ordinary, he should be bound in the Sheriff Court to make his report to *the Sheriff-Substitute*. We recollect once being present in the Court of Session when an eccentric litigant was conducting her own case in a rambling manner. One of the judges had withdrawn his chair from the front of the bench and sat somewhat obscurely in the shade. The lady was told to address her observations to their Lordships, when, casting her eyes upwards, she observed the figure of Lord —, and exclaimed with some show of apology, "Ah, this old gentleman I had quite overlooked." But the Act has now set matters right, and the word "sheriff" has taken its proper place in sub-section 5.

The accountant of Court has quite a peculiar position under this statute. If he finds much diversity arising in matters of judgment or practice "amongst the various Sheriff Courts, he is to report the same to the First Division of the Court of Session, and ask for a rule under which uniformity of judgment is to be obtained. It is not easy to see how uniformity of judgment can ever be brought about by a mere rule. Further, as the committee of the Faculty point out, "this rule, which is neither an Act of Parliament nor an Act of Sederunt, nor a decree of Court, is to be obeyed by the Sheriffs without apparently becoming known to them in any particular way, as there is no provision for its promulgation." However, under section 5 very ample powers to pass Acts of Sederunt are conferred upon the Court of Session, and doubtless this rule, if it is required, will appear in the familiar shape. Indeed, under this Act the Sheriffs are merely the officers of the Court of Session under the superintendence of the accountant, and it may with reason be asked whether the same results would not have been effected by relegating all such appointments of factors to the clerks of the Lord Ordinaries to be dealt with by them without the intervention of counsel.

The longest thing about the "House-Occupiers in Counties Disqualification Removal (Scotland) Act, 1880" (43 and 44 Vict. c. 6), is its title. It is to enable such house-occupiers to let their houses furnished during a portion of the qualifying period not exceeding four months, without any risk of having their names struck off the roll.

The Act to abolish imprisonment for debt and to provide for the better punishment of fraudulent debtors is noticed separately.

The "Census (Scotland) Act, 1880," is very similar to that passed in 1870. We note two points of distinction. Whereas under the former Act the duty of superintending the registrars and enumerators fell on the chief magistrates in the case of all the towns in Scotland, under the present Act that duty is to be performed by the Sheriff, except in the case of the eight largest towns. What a wonderful official the Scottish Sheriff really is, who is called upon

to bear an ever-increasing load of responsibilities! But have not the magistrates of our smaller towns good cause to be jealous? Did they fail to perform their part in the census of 1871? Further, the half of the fines to be imposed next year are to be paid over to the Queen's Remembrancer instead of the collector of the land-tax, who could claim them in 1871.

"The Employers Liability Act," 1880 (43 and 44 Vict. c. 42), effects an important change in what has come through the process of a series of decisions to be the common law of this country. It is not necessary to go further back than the case of *Sword v. Cameron* (13th February 1839, 1 D. 439) to find what was the old law of Scotland upon the liability of employers. That case was decided as if no such relation as that of master and servant had existed, and the plea of *collaborateur* was evidently never dreamt of. It seems to have been first taken in *Dixon v. Rankin* (31st January 1852, 14 D. 420), "entirely," as is observed by the Lord Justice-Clerk, "on the force of certain decisions and opinions of the Courts of England," and it was at once repelled. "The servant," observed the same judge, "in the contract of service in Scotland undertakes no risk from the dangers caused by other workmen from want of care, attention, prudence, and skill which the attention and presence of the master or others acting for him might have prevented. His master is bound to him in obligations which are to protect him from such dangers." It is somewhat singular to find, a few years later, a statement proceeding from the Bench of the House of Lords to the effect that while there might be *obiter dicta* of some of the judges, there was no Scottish decision irreconcilable with the English rule (*Reid v. Bartonshill Coal Company*, 17th June 1858, 20 D. (H. L.) 13). This decision of course brought about a complete change in our law, and henceforth we can trace a gradual development of the new principles, from the case of *Merry & Cunningham* (31st May 1867, 6 Macph. 807), in which it was held that the doctrine of *collaborateur* applied even where the injury was caused by the fault of a superintendent, down to that of *Woodhead v. Gartness Mineral Company* (10th February 1877, 4 R. 469), which included the employees of contractors in one common employment with the servants of those for whom the contractors themselves worked. But in the meantime the labouring classes have been agitating in various ways, and a return to what (in spite of the House of Lords) is generally recognised as the old law of Scotland has been urged.

The present measure is obviously a compromise between the upholders of the old and the new doctrine. The way is again opened up for an action of damages at the instance of the injured workman. But his right of action is limited in three very important respects. In the first place, it is limited *in point of time*. In the case of injury the action must be commenced within six months of the accident which caused it, while in a case of death represen-

tatives have a period of twelve months. In the second place, it is limited in respect *of the damages to be recovered*, which is not to exceed the estimated earnings of the workman during the three years preceding. In the third and last place, it is limited in respect *of the Court in which the action may be brought*, which must (in Scotland) be the Sheriff's. Further, the pursuer must be prepared to trace the injury which is the ground of his action either to defect in the machinery, negligence in the person placed over him, or act of disobedience of his fellow-workman. In railway cases "the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway," if it leads to injury, gives a right of action to the injured fellow-servant.

When we come to look at the provisions for trial of such actions, it is startling to find that this statute has introduced something like juries in civil cases before the Sheriff Court. Assessors may now be appointed for the purpose of ascertaining the amount of compensation. Sub-section 3 of section 6 provides that rules regulating the appointment of such assessors, their remuneration, etc., may be "made, varied, and repealed from time to time." It does not say by whom. Hitherto the Court of Session by Act of Sederunt has done such work. But there is no authority conferred, as is usual, upon that Court. Again, all such actions are to be brought in the "Sheriff Court." Does that exclude the modest workman who seeks less than £12 in name of damages from taking out a small-debt summons? If it does not, then a small-debt case may under this same sub-section be removed to the Court of Session, "in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act, 1877." This would be absurd. In short, it is obvious that the bill has been framed by those who knew nothing about our Sheriff Courts.

The Ground Game Act of 1880 (43 and 44 Vict. c. 48) has, we trust, settled a long-standing source of grievance between landlord and tenant. We need only here call attention to the 5th clause, under which, in the application of the Act to Scotland, the rights of the lessees of shootings are preserved.

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## THE DEBTORS (SCOTLAND) ACT, 1880.

THE long title of this Act is misleading, inasmuch as it contains the expression "An Act to abolish imprisonment for debt." Imprisonment for debt is no more abolished than hypothec has been by the statute recently passed by an expiring Parliament. The sphere of the punishment has only been limited, that is all. Had the ground of imprisonment known in England as contempt of

Court been substituted, then it might be said that imprisonment *for debt* no longer existed, at all events in name. But notwithstanding the limitations which attend the so-called abolition, a very great change has been effected, perhaps greater than the general public, who think very little of Acts of Parliament at the time they become law, are in the least aware of. But it is a change which that public are deeply interested in. There are thousands, no doubt, who, fortunately for themselves, are never called upon to consider this subject of imprisonment for debt. They pay their own liabilities and find their debtors do the same. But one who has come much in contact with the lower classes, with petty dealers and their customers in such places, *e.g.*, as fishing or mining villages, or who has ever watched the proceedings in a crowded Small-Debt Court, has doubtless observed the sad familiarity which poor people have with all the machinery of the law for the recovery of debt, how the mysteries of diligence are no mysteries to them. The sheriff-officer is as well known an official as the postman, and imprisonment has calmly to be contemplated as the possible termination after charges and poindings have been exhausted. It may be that comparatively few are actually sent to prison, but there has always been the threat, and in the opinion of some men of experience that threat had its use. Men can secrete their goods, or their goods may be of little value. But it is not so easy to conceal themselves, and liberty is always sweet. The disgrace too of imprisonment might induce friends to lend a helping hand. But here we touch upon the weak point of the system which has to so large an extent passed away. The creditor has no right to extort his money from his debtor's tender-hearted friends by making him an object of compassion. This could be the only object in the majority of cases where the creditor persisted in maintaining the imprisonment.

From and after the 1st of January 1881, no one, with certain exceptions, is to be imprisoned for civil debt. The first question which naturally arises is, Why have exceptions? If imprisonment be a good thing, and really leads to the recovery of the debt, why make distinctions between debts, or rather creditors? Nor when we come to look at the exceptions does any satisfactory answer suggest itself. If a man cannot pay his taxes he may have to go to prison. That is to say, legislation reserves the right to imprison where the debt is due to Government. Again, if the sum decerned for be for aliment, imprisonment can follow. Here the exception is more plausible, but it ends in a retrograde direction. A long time ago it seems to have been held that where the debt was alimentary (say due for an illegitimate child) *cessio* could not be granted. But that notion has been given up. A man's inability to pay either his taxes or alimentary debts may arise from innocent causes. Surely servants and other employees have as much right to be considered as a man's tax-gatherer or the mother of his illegitimate



children. Such exceptions seem tantamount to an admission that it is after all a good thing to send the debtor to jail, or at all events to retain the threat of putting him there. But the Act goes on to provide that no one shall be imprisoned for a longer period than twelve months. This provision all must welcome as an improvement. Although cases of lengthened incarceration have not perhaps been numerous of late, still there are such cases. In a former number of the *Journal of Jurisprudence* (vol. xx. p. 399) we called attention, in an article upon imprisonment for debt in Scotland, to one where imprisonment had lasted for about three years. The debtor had been refused *cessio* on several occasions because he was suspected of perjury and fraudulent bankruptcy. To quote what we then said: "There is a suspicion that he has committed two crimes. If that suspicion amounted to a certainty and the man stood a convicted criminal, mere imprisonment, and that for no long period, would probably be the result. But the man who labours under these suspicions, arising from his conduct upon examination, is sent to endure *squalor carceris*." Under the present Act such a man would be differently dealt with. He would be tried for failure to disclose the state of his affairs with intent to defraud, and if convicted, disgraced and punished as a criminal instead of leading the more dignified life of a civil prisoner.

Very properly the right to imprison has been retained in cases of warrants against persons *in meditatione fugæ*, or under decrees and obligations *ad factum præstandum*.

Such changes in the law have rendered necessary alterations in the definition of notour bankruptcy and the process of *cessio bonorum*, which this Act proceeds to make. In cases where imprisonment is now incompetent, such imprisonment is unnecessary for the constitution of notour bankruptcy. That is effected by the failure to recover the debt after the expiry of the days of charge, or of the time following a decree for payment when a charge is dispensed with.

As civil debtors still continue, they can still exercise their right of raising a process of *cessio*. But it is obvious that no one who is exempt from imprisonment is likely to do so. Hence the law has given to the creditor the right formerly conferred upon the debtor alone, and the former may now present a petition praying that the debtor may be decerned to grant a disposition *omnium bonorum*. It is not likely that this provision will be largely taken advantage of. If there are any assets, sequestration is the natural course to pursue; and if there are none, the creditor who brings his *cessio* has only the certainty of incurring expense. The provisions regulating this new process of *cessio* are similar to those already in use.

Perhaps the most important part of the statute relates to the punishment of fraudulent debtors, and seemingly it adds quite a number of new offences to the criminal law. Upon examination,

however, it will be found that is hardly the case, for at present offences similar to several of those set forth here may be punished at common law and under statute. Under the 93rd section of the Act of 1856 the penalty for refusal on the part of a bankrupt to answer questions or produce his books is imprisonment, but he is not exactly a criminal, and may have his imprisonment recalled by an application to the Lord Ordinary. But under the new Act he shall be deemed guilty of a crime or offence, and liable to imprisonment not exceeding two years. Perhaps the most important addition to the law is that contained in section 13, sub-section 6, which renders it an offence in cases where the debt exceeds £200, to have kept no books or accounts during the three years preceding sequestration or *cessio*. But there is a saving clause which applies to these new crimes, and definitions of old ones. The prisoner may prove to the satisfaction of the Court that he had no intent to defraud. The Acts specified only raise a presumption of guilt which it lies with him to overcome. Under section 15 a trustee in a process of sequestration or *cessio* is bound to report to the presiding judge all offences coming to his knowledge. The judge can only order information to be laid before the Crown, and it lies with the Lord Advocate alone to order a prosecution. This is an innovation, as at common law a sheriff can take all the steps necessary for the punishment of crimes.

Such is the present state of the law relating to debtors and their frauds. The old system has worked long and entailed but few hardships. It remains to be seen whether a change has really been made for the better. The aim of the statute unquestionably is to discriminate between the unfortunate and the criminal. That aim is certainly praiseworthy, a doubt can only exist as to the means adopted.

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## THE JURISPRUDENCE DEPARTMENT OF THE SOCIAL SCIENCE CONGRESS.

THE meeting of the Social Science Congress in Edinburgh last month, and the many valuable suggestions broached and discussed in the Department of Jurisprudence, must necessarily have afforded to the members of our profession much food for thought. We have accordingly resolved to attempt a slight sketch of the proceedings of the Congress in this particular branch of its labours, with such observations on them as occur to us, rather with the idea of keeping up the interest in the topics then considered, and of bringing them yet more fully under the notice of the profession, than of attempting to offer new and original opinions of our own.

The Jurisprudence Department and its doings attracted all the greater notice from the fact that the first Law Officer of the Crown

had consented to preside over its sittings, and the power together with the broad range of the Lord Advocate's opening address gave a tone to the subsequent debates of this section. Taking as the first branch of his remarks the subject of Criminal Jurisprudence, the learned speaker first considered the question of an extended system of public prosecutions, we mean extended in the sense of its embracing the whole United Kingdom; for the idea of mere extension of our Scottish system *as it is* to England, for example, with its local peculiarities and much greater population, was carefully guarded against. Why, practically it was asked, search about for some system of public prosecutions that shall be adapted to the people of England without looking across the Border, and examining a system of the kind already in existence there, and already known by experience to work well? "It certainly strikes a Scotchman," observed the Lord Advocate, "as singular that English lawyers should be engaged in investigating this problem upon first principles, as if it had never been attempted before, when, if they look north of the Tweed, they would find it practically solved to the satisfaction of the community, and with the result that private prosecutions are as completely affairs of the past as those private wars which flourished under the social conditions prevailing in Scotland until the middle of the last century." This reference to private prosecutions leads us to the observation, that one of the advantages of a system by which the Crown is the prosecutor as well as the punisher of criminals may be found in this abolition of private prosecutions, for truly it is an abolition by desuetude. No doubt in theory any man may still privately prosecute on obtaining the concurrence of the Lord Advocate, and any person who sought that concurrence would, we feel sure, receive it unless under very special circumstances; nevertheless in practice no one asks it. The aggrieved person, or some one for him, or for public reasons, lodges a complaint, and the victim of the crime feels satisfied that the facts will be sifted impartially and carefully, so he takes no farther heed of prosecuting, but leaves it in what experience has shown to be the safest as well as the most expeditious management. We are thus freed from a source of danger ever present in private prosecutions, namely, keen personal feeling and animosity. The Crown official who does his duty must do it with the strictest impartiality and freedom from bias, must approach the consideration of each case, involving as it may do the freedom or even the life of a fellow-citizen, in what might almost be called a judicial frame of mind. Again, in many cases where a private person prosecutes and has no one to take up the case for him, as in Scotland, in the public interest, the personal impecuniosity of the prosecutor, or of him who should have been the prosecutor, may lead to a miscarriage of justice by the escape of those who should have been within its reach. Surely, it may be argued upon every ground of good government, the State, which levies taxes from its subjects to secure their wellbeing and

protection, has a natural duty thereby imposed upon it not merely of punishing offences when discovered, but of seeking out and bringing within range of that punishment those who perpetrate crimes against the commonwealth or its individual citizens. "The principles of public criminal law administration," says the address elsewhere, "must necessarily be the same for both divisions of the kingdom, and these principles can best be studied as exemplified in practice under a departmental system which has stood the test of experience." In another portion of his address the Lord Advocate referred to the Public Prosecutor now appointed in England, adding, however, that he was not aware that the new department there was about to adopt our system here in the north. We confess to having felt extremely puzzled as to what this Public Prosecutor in England has to do, or has since his appointment done. He appears to have been added something after the fashion of an extra and merely ornamental flywheel to an already existing machine; the new addition is strong, good, and expensive, but the old machine goes on just the same, and it is with difficulty that even the semblance of something to do is found for the new addition. The active mind of the President of the section, however, was not content with showing the merits of the system here, and the difficulties in the way of its adoption in the other parts of the United Kingdom; he went farther, and in the most practical way suggested how in England the change might be brought about.

It was pointed out that there the police are the moving element in the preparation of nearly all important cases for trial, making all the inquiries, and faithfully carrying out these duties. Where the police act as prosecutors, both counsel and solicitors are paid by the Treasury, and the cases are dispensed according to their number (at least during Quarter Sessions), so that they are taken by the various counsel present something like parochial relief, giving rise to the term "soup at Sessions," applied often in England to this class of work. Now we venture to think that there is in the case of police conducting such inquiries, and carrying out such prosecutions, an objection we have already mentioned in the case of private prosecutors. As in the latter there may be personal *animus*, so in the former instance there may be professional *animus*; and here it is that the value of a public prosecutor with local position and knowledge comes in. The Crown official alone could initiate the action of the police, who would take their orders, however, as heretofore, from their chief-constable. It might not be so pleasant for chief-constables in England, but that, of course, would not signify in the least where public interests were to be served.

Now we may be allowed to quote a few sentences from the address, showing how, suiting the new arrangement to forms already existing, the proposal for a change was laid before the Congress. "I should make a beginning in the larger counties by separating the functions of chief-constable and public prosecutor, giving the

latter office to a solicitor, and making it part of his duty to conduct prosecutions before the Quarter Sessions. The next step would be to assign the conduct of prosecutions at the Assizes to a single counsel for each circuit, instead of dividing the briefs as at present among the younger men practising on the Crown side of the Court. The prosecuting counsel would in important cases be consulted before the trial, and after the profession had become accustomed to the system of public prosecutions, the prosecuting counsel would be associated in a legal department and made responsible for the general criminal business of their respective circuits." With all that has been quoted we can entirely agree, but still there are, even as things stand, considerable difficulties in carrying out such a system without overloading the new department to a degree very apt to impair its efficiency. We shall endeavour to show what we mean. Take, for example, the Assizes at Liverpool or at Manchester, and it will be found that the business, not only criminal, of course, but civil also, lasts from a fortnight to three weeks, or about, on the average, say ten weeks in a year. Now, putting the civil business as twice the amount of the criminal, we should have three or four weeks of purely criminal work, about a week for each visit of the judges. This represents in a year very much more than the heaviest of our Scottish circuits, the Western, would give in the same time. That circuit is so heavy that the Advocate-Depute who prosecutes has in Glasgow always the assistance of another prosecuting counsel in a second court to enable him to overtake the number of cases, and even with this we believe it is generally considered to be very hard work. The other circuits, which are lighter than the Western, nevertheless call for continual attention and work from those who are in charge of them. This being so, it will be manifest to our readers what an enormous number of prosecuting counsel would be absolutely necessary. Liverpool or Manchester are only single places of assize on the Northern Circuit; each of these places certainly gives much more work than Glasgow does, and practical experience shows that Glasgow, with the essential preliminary preparation of cases, and disposal of questions requiring inquiry, cannot be managed by one man. It follows, therefore, that each circuit would require to be divided into prosecuting districts sufficiently large to give work fully to one, or where two judges sit simultaneously, to two men. It seems to us that probably the more simple way would be to have a prosecuting department for each circuit corresponding to our Crown Office, and to have reported thither all cases as they are in Scotland. A senior counsel for the Crown might be attached in each case for purposes of consultation and advice, and in any instance where questions of national importance arose, a further and final reference might be made to London, where the Attorney and Solicitor-General, as advisers of the Crown, would finally decide upon what was to be done. We also venture to think, as no doubt the Lord Advocate



would have told his audience had there been time to enter into details, that all these offices should be paid by salary and not by fees. The movement in this direction has been very strong all over the country of late years, and there can be no doubt that a fixed sum is better for the public, and in the end generally for the recipient himself. Yet another observation occurs to us with reference to the scheme laid before the Social Science gathering. It is proposed that to solicitors should be confided the whole Quarter Sessions prosecutions. This would not be a matter worth mentioning in Scotland, where Quarter Sessions is merely the solemn sitting down of a quarterly court and its uprising, and little else; but in the south this is a most important matter, and counsel attached to the circuit as regularly attend the Sessions as they do the Assizes. There are in England now a daily increasing body of barristers who are known among their legal brethren as "locals," because they attach themselves to a certain place, taking up their residence there and regularly practising before its Court. The leaders of this local bar in such places as Liverpool and Manchester are men making a handsome income, and thoroughly equipped in all the armour of the profession. Now we venture to think that from this body might be taken, *not* those who are to make the inquiries and do the work of solicitors in Crown prosecutions, but in some districts, at any rate, those who are to prosecute at the Sessions. From these "locals," who have only become an institution of later years, already, at least, one Attorney-General has sprung; and it is not unusual for a "local" whose reputation is sufficiently good in his own town to move to London, and there, supported by those whose confidence he has deservedly earned, to rise to large and lucrative general practice.

In concluding what we have to say upon this suggested change in England, we must deprecate anything like a half measure to begin with. If a new department is to be formed, let it be so for each circuit, and speedily. If it be thought necessary to work gradually, let that be done circuit by circuit, but let the change for the district be complete in itself, and not worked out by a series of developments.

Passing on from these most interesting questions, the Lord Advocate in his address proceeded to face the weakness of our Scottish criminal jurisprudence, and the advantages which even now to some degree English lawyers have in this respect, an advantage, as was pointed out, shortly to be almost immeasurably increased, unless we in our turn also take advantage of the opportunity for improvement afforded us. "The criminal jurisprudence of Scotland is, like the common law of the sister country, founded on custom and the decision of the judges. No authoritative statement of its principles has ever been promulgated in writing. Its definitions are to be found in the commentaries of judges and advocates; its sanction is supposed to be the conscience of the

community; its classification of offences is purely arbitrary. Arbitrary punishment, in fact as well as in name, dominates the whole category of criminal law in Scotland, with the exception of those crimes, now practically reduced to one, which the common law punishes by death. The elasticity of the criminal law of Scotland has been much vaunted by our judges and jurists. My professional sympathies incline me to their view, and I hold with my profession that our judges and commentators have done their work well. But, as a citizen, I cannot forget that this elasticity of criminal law has in past times, and possibly within the memory of living men, been an instrument of the grossest oppression." The English criminal law shows traces, as was observed, of having a similar unwritten and elastic system; but statutes literally by the hundreds have interposed, and they now "exercise the ingenuity" of English and Irish lawyers by their technical and complex and not unfrequently contradictory provisions. No one, we may presume, will hesitate to admit that when a judge proceeds upon a statute his position in the eye of those unacquainted with law is materially strengthened, and that "the administration of the criminal law will most commend itself to the approval of the honest and law-abiding portion of the community when the judge is in a position to point to the very statute which has been broken, and when the public . . . can satisfy itself that the law is justly administered and the punishment suitable to the offences proved." For the discrepancies and differences between not only the decisions here and in England and Ireland, but even the severity and leniency of sentences and so forth among ourselves, there is proposed the great and universal panacea, a code; rather, indeed, we should not say it is proposed, but its advantages are pointed out, and its actual existence, as sketched out by Sir James Stephen, predicted for no distant day. The address, however, speaks with approval of the saying that "a code is the ultimate form of every good system of laws." To this we demur in some degree, because as necessarily the most elaborate code must be imperfect, it follows that a lapse of years will render even this "ultimate form" antiquated, and lead to fresh legislation or renewed codification. Rather we should prefer to regard a code as sweeping away all confusion and complexity in the past, and forming a sound and solid basis upon which future advance may be made. To attempt codification with an uncivilized society, and imperfect ideas of right and wrong in the public mind, would be folly; but in this country we are surely now, if ever, ripe to receive from our jurists a stable substratum upon which generations to come may, if they so please, build yet more ambitious edifices.

Boldly, in concluding his remarks upon the question of a code, did the speaker sweep away technical jargon, for such it truly is, and professional or local prejudices. He points out that where there are differences of a substantial character between our laws

for criminals in Scotland and those observed in England, either we are wrong or they are, and in either case the assimilation of the two laws is but an act of right, the remedy of a wrong. Before we pass, as we must, from this portion of the address, the thought recurs that even when a code has become an accomplished fact, its *interpretation* will be made the subject of dispute. Its provisions will become food for argument, and different judges in different places will be, if human nature alter not, sure to lay down different law. How can this be remedied? We see it in the statutes that are from year to year added to our law; some in England are taken one way, in Scotland another. Who is to settle the point where the experts themselves differ? May it not be necessary, if we have one criminal code, to provide for conferences of all the supreme criminal judges in the kingdom where points of interpretation are at issue? We offer the suggestion for what it is worth, but surely a conference of such a character, even though cumbersome and to some men's minds unseemly, would be better for us all than the spectacle of contrary, we almost said rival judgments, where too often the judge may be lost in the disputant, and the even balance of opinion, in the desire to outshine or outargue.

Passing on from these considerations as to a criminal code and its value, the Lord Advocate took up one point of great interest in connection with "the right of the State to permit, and, if necessary, require an accused person to give evidence in his own case." This the commissioners who have prepared the draft code do not propose to allow, but they suggest that it should be made optional on the part of the accused to tender himself for examination, being also in that event liable to be cross-examined by the prosecutor. The difficulty about the whole matter seems to us to lie in the fact that you cannot compel a prisoner to make any reply to questions put to him, any more than you can force him to say anything in his declaration when taken according to our practice here. For this reason probably there has been inserted the proposal in the code giving the accused an option. It seems to us that the present form of declaration is very good; it is guarded against abuse, and forms a most valuable element in getting up a case, or rather in making those inquiries necessary before any person is indicted and tried. It happens, we do not say often, but certainly with a moderate degree of frequency, that a person who is charged makes upon declaration certain statements, it may be merely exculpatory of himself, or further incriminatory of others, the result being that the procurator-fiscal at once directs his attention to these statements with a view to testing their accuracy; and then it is discovered that the accused is telling what is true, and that the suspicions against him were unfounded. This valuable opportunity of clearing himself would be to a large extent neutralized for any accused person were he limited to what he could say in the witness-box at the trial, for then his statements in all probability would have to

rest upon his own character for veracity and the effect he produced, as it would be too late for general inquiries to show how far they were well founded. In point of fact, the change that we advocate would leave the declaration system as it is, and allow in addition to, or, if preferred, in lieu of, the declaration any statement in Court by the prisoner as a witness in his own defence. Direct evidence, we know, is always preferable, and not only so, but Courts will not take any evidence but the *best* adducible; and surely the taking of a declaration as it is now done, and the exclusion of the oral evidence of the accused, is in point of fact a direct violation of this rule, and a preference exhibited against the accused and for the prosecution in favour of what would in all other circumstances be a kind of evidence that is rejected. Take, for example, a deposition emitted by a man at the point of death: this, if he dies before the trial, is received, because it is the best evidence that can in the circumstances be got; but if he lives, it is not the best, and is therefore not received. So with an accused person his declaration would be only available where he declined to offer himself as a witness, as being then the best available evidence, and the statements he might make in the declaration might be sifted and thoroughly established or contradicted. "The State," observed the learned President, "has a legitimate interest to give him [the accused] an opportunity of making explanations, and he can have no legitimate interest to withhold them. Our practice of taking declarations in private is based on this assumption. One can see a principle for utterly refusing to receive a prisoner's statement. But having agreed to receive it—and to submit it to a jury—is it, I ask, anything but the merest prejudice which prompts us to offer it to the jury in the form of a weak dilution, instead of presenting them with the unadulterated article as it falls from the lips of the prisoner himself?" The speaker no doubt was arguing his case higher than we should feel disposed to go, that is, arguing in favour of a necessary examination of the accused without option on his part of refusal; but the same principle underlies either view, we mean the principle of obtaining the best evidence. In the case of a prisoner we think the best evidence from himself is that obtained voluntarily—direct if he will agree, indirect if he so prefer. A prisoner, from the very fact of his being an accused person, is not truly on an equal footing with other witnesses, and this is our reason for according him an option. If he declines, then his declaration becomes the best evidence that can be got from him. It is notorious that even ordinary witnesses often act in the witness-box when under examination in a hesitating and unnatural manner, and this would be more true in the case of accused persons who might by agitation when entirely innocent strengthen a weak case against themselves, and by prejudicing unfavourably the minds of the jury receive an unjust verdict.

The rest of the presidential address in the Department of

Jurisprudence was occupied by a consideration of a system of compulsory Land Registration as we have it in Scotland, to be introduced generally throughout the kingdom. Reference was made to two attempts at this, vitiated, as was observed, "by the taint of the 'permissive' element." "A law," it was added, "which the State approves, but permits its subjects to disapprove, which is obligatory on the Legislature, but which the persons affected may treat with contempt, is, I venture to think, worse than useless. It is in many cases a positive hindrance to efficient legislation. It is always, and necessarily, a failure, viewed as a means to an object, and the worst of it is, that the impression of failure is liable to be transferred to the object itself in the estimation of the public, who do not always consider that a measure cannot be said to have failed if it has never been properly tried."

Working from centres already existing in London and in York, for the counties of which those cities are capitals, the simple suggestion is made that from year to year fresh counties should be added; and that in this manner there would be time to get a trained staff of registrars who would understand their duties, and move on as each new county came into the fold to instruct the local officials in their new duties. It might be necessary to have more centres than two, but that would be merely a question of detail in working out the scheme. A most judicious proposal was made as to the anticipated expense, which leads to much opposition, it is said, among our English neighbours, that proposal being for the State to undertake to register free of cost the first deed relative to every estate. We feel sure that once this were done, once owners found the advantage of having their titles secure beyond doubt, once creditors were assured that no prior mortgage existed to exclude their rights, and once the public knew that a simple process would assure them of what they were buying, all opposition would cease.

The subject of registration of titles occupied subsequently the attention of the Municipal Law Section, when two papers were read upon it. In one of these the writer pointed out the value of what had occurred in Ireland, and seemed to regard the expense as a great point. We confess that it would be a great point were it established that registration largely increased the expense of land transfer, already ridiculously great, but we doubt very much whether this would be the case. Sir R. Torrens, who read another paper on this subject, gave an account of what has been done in the colonies upon this branch of law. He explained that the mode adopted was as follows:—

"The person or persons in whom, singly or collectively, the fee-simple is vested, either in law or in equity, may apply to have the land placed on the register of titles. These applications, together with the deeds and other evidences of title, accompanied by plans of the lands, furnished by licensed surveyors, and certified correct by statutory declaration, are submitted for examination to a barrister



and to a conveyancer, who are styled 'examiners of titles.' These gentlemen examine the titles precisely as they would do on behalf of an intending purchaser under the old law. They report to the 'Registrar,' or 'Recorder of Titles,' as he is styled in some colonies—1st. Whether the description of the parcels of land is definite and clear? and in this they are assisted by a land surveyor and draughtsman 2nd. Is the applicant in undisputed possession of the property? 3rd. Does he appear in equity and justice rightfully entitled thereto? 4th. Does he produce such evidence of title as leads to the conclusion that no other person is in a position to succeed against him in an action for ejectment? Should the applicant fail to satisfy the examiners in these particulars, the application is at once rejected, without putting him to any further expense. Should the applicant, being in possession, be enabled to show such a title, although the evidence he adduces might not be sufficient to enable him to oust a tortuous holder in possession, or to compel an unwilling purchaser to complete, the examiners would report the case to the registrar, with the recommendation that notices should be served, and the claim advertised more or less extensively, according to the nature of the case and the domicile of the parties likely to be interested."

This of course would be unnecessary where the State was parting with Crown lands, none of which are disposed of without due registering of the title. The system has worked for twenty years and is found efficient, at least the author of the paper seemed to think so. We are not, however, quite sure as to the sufficient publicity of notices such as those mentioned. There cannot be a doubt that this is a vital point in any such inquiry, as otherwise registration may become in the hands of unscrupulous persons the means for perpetrating the grossest frauds. It is also very needful that the notices be served upon all who may be concerned, in addition to their publication; this we learn is done, for the author of the paper said that the notices so ordered by the registrar on the advice of the examiner, are served upon those actually in possession of the land, and further, upon such persons, if any, as the examiner might indicate as likely to be interested either in law or equity in the ownership. All, indeed, should receive intimation of what is going on who may have an interest, but there is, as we know by results, in some instances the greatest possible difficulty in knowing the true state of matters. A slight *suppressio veri* may set the examiner and the registrar upon a totally wrong track, and the subsequent appearance of the register will mislead instead of directing. Another body of persons upon whom notices should be invariably served are the owners and occupiers of adjoining land. From what Sir R. Torrens said we gather that this is done where all does not seem to be clear sailing to the critical eye of the examiner, but we think that these are notices which should be given in *every* case, as the absence leaves the title burdened by possible disputes as to boundaries and so forth. These matters

are trifling. A few yards signify little where there is plenty of room for all, but let a city grow up, like Melbourne, in a few years, or, like American cities, in a few months, and land and its boundary questions assume a very formidable pecuniary aspect for the holders. To produce evidence of due notice upon neighbours, and no objection raised by them, would become of no slight importance as an argument in favour of the right of the notice-server.

As to the terms of the notices themselves, we learn that they state what the object of the application is, intimating that should no objection be raised within a prescribed time, the land will be brought under the provisions of the Act, and the applicant will receive an indefeasible title. The form in which the objection may be taken is by lodging a caveat within the time appointed, and if that is done, then the whole matter passes into the Supreme Court, and the registrar cannot register or move further in the matter until their final judgment be given. Should there be no caveat lodged, however, or, similarly, if it is withdrawn or overruled by the Court, then the final step is taken for placing the land upon the register of the colony by the issue of certificate of title, vesting the estate indefeasibly in the applicant. The certificates are in duplicate. They define the land in respect to which they are issued by description and reference to the Ordnance maps of the district, and where necessary by diagram on the certificate. They set forth the nature of the estate of the applicant, whether a fee-simple or limited owner, and notify by memorials indorsed all lesser estates, leases, charges, or interests current and affecting the land at the time. Ample space is left for the indorsement of subsequent memorials, recording the transfer or extinction of these, and the creation, transfer, or extinction of future estates or interests.

With commendable pride in the system, Sir Robert pointed out how well this plan avoided the expense of a reference to the Courts, and thus how expense was saved. We have already indicated wherein we fear there might be a risk, not in the expense, nor in the title to the holder, but in the holder's acting himself fraudulently, and yet excluding practically all inquiry into his frauds by the exhibition of an unchallengeable title.

Further, we think that for an old and long-settled country like this, with so many local peculiarities and customs, there would be great difficulties in the way of such a system. Rather possibly it might be best to require every owner to register at once, or to register for him, providing that his title should be open to challenge for a certain and not inconsiderable period. Sales of land might be made simpler, perhaps, by utilizing the large and elaborate Ordnance surveys we now have for the whole kingdom, and by requiring purchasers to have marked upon special copies thereof for the district, with precautionary formalities, the boundaries of the purchased land, the same being indicated by a letter and numeral. It would be essential in all this to have everything

arranged beforehand, and the gradual development of the scheme might therefore be advantageous, provided always that it was *universal* for each district to which successively it became applicable.

There is, however, always a point to be borne in mind, and that is the constant accumulation of documents where registration is compulsory and universal. Even in this country the accumulation already is vast, and it is not unlikely that some method will have to be resorted to for returning to their proper owners all the original title-deeds that may have become unnecessary for titles, amply fortified by prescription, or else by absolutely prohibiting the repetitions in the register which so often may be found. The preparation of indexes and good classifications and arrangements have already much simplified the work of the Register House, and this suggestion might perhaps solve the problem of space.

In concluding his address, the President referred to questions affecting land tenure, and especially freedom of contract. Putting the point made in the words of the speaker, it was this: "To prohibit contracts into which parties desire to enter, and which are neither immoral nor hurtful, is not jurisprudence. To compel parties to enter into contracts of one description, when they wish to enter into contracts of a different nature, is not jurisprudence. Jurisprudence assumes as its hypothesis a certain relation voluntarily entered into between two or more parties, and undertakes to define the conditions and consequences which flow naturally and equitably from that relation." After further summing up in a few sentences the reasons why it was especially valuable that a scientific association should take up these questions and define properly the limits to which law reform should be extended, the address concluded with these words: "Where a law ceases to represent the habits, wishes, and tendencies of society, it is already condemned; where it is in accordance with those elements of public sentiment, it is the duty of the jurist to encourage it, so as to give free play to the social forces which have brought it into operation."

*(To be continued.)*

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## Correspondence.

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*(To the Editor of the "Journal of Jurisprudence.")*

### LIMITATION OF CARRIERS' LIABILITY—CONDITIONS IN PASSENGERS' TICKETS.

SIR,—I have been much interested with your recent articles on this subject, which is one of very considerable practical importance at the present day. There can hardly be any one, I should think,

who has not occasionally, when travelling by rail, in some abstracted or melancholy mood—for it is only at such times that travellers think of reading the small print on their tickets—first opened his eyes wide with surprise, and thereafter uttered ugly words in indignation at the unreasonable and one-sided stipulations sometimes to be found on these interesting bits of pasteboard.

The recent decisions on the subject seem to my mind to be tolerably satisfactory, and showing a desire on the part of Courts—the higher Courts at least, which alone can take the lead in such a matter—to overlook bare technicalities, and take into account the relative positions of the contracting parties, and other considerations suggested at once by equity and common-sense.

The opinion indicated by Lords Chelmsford and Hatherley, that the ticket does not form part of the contract, is a very interesting and, emanating as it does from such high authorities, practically important view of the matter. It is certainly not an unreasonable view, as is very well brought out in the article I have referred to: I must say I think the ticket should be regarded as merely *evidence* that you have paid and the company have accepted the fare, *that the company and you have entered into a contract of carriage*; but the writing or printing on the ticket, whether on the face or the back of it, having been put there by one of the contracting parties only, should not surely be decisive of the rights and liabilities of either of the contracting parties. These should be determined by public law, and considerations of equity and expediency, terms which, though pooh-poohed by some so-called “scientific” lawyers, are showing themselves every year more and more powerful in modifying our laws, for against unreasonable stipulations on tickets the passenger has but the barest protection imaginable. It may be said, If you object to the company’s conditions, don’t travel by that line. But every one knows that practically one has no option as to travelling by rail; business will not permit us to go miles out of our way, or delay for days, all because of an objectionable stipulation on a railway ticket. Railway companies obtain from Parliament the privilege of forcing their way through a country, and being to a large extent a monopoly, they ought to be under some sort of restriction as to the terms on which they are to exercise their functions.

Even in the case of a passenger being sharp-eyed enough to detect the objectionable condition on the ticket or book of regulations, as the case may be, issued by the company, and having the courage and business aptitude—as also the necessary time—to make a protest against this condition, I should like much to know what his legal position would be in the event of an accident. Suppose, just for the sake of example, it were declared on the ticket that the company did not guarantee the stability of a certain bridge or a certain portion of their line, the question would then be, Whether the company had a legal right to make the

stipulation protested against? and in the event of it being decided that they had, what then? The passenger had not agreed to the condition, and on the other hand the company would probably take up the position that they refused to carry on other terms, and that the fact of the passenger allowing himself to be carried was evidence of his accepting the company's conditions. It is somewhat difficult to see how a passenger by simply protesting can take the benefit of carriage by the company, and yet shake himself free of stipulations which the company are legally entitled to make as the condition on which they agree to carry.

In the event of it being found that the company had no legal right to make the stipulation in question a condition of their carrying passengers, there would of course be no difficulty. The protesting traveller would be entitled to ignore it altogether in formulating his claims of damages.

But in the case we have supposed, after the traveller had protested against the condition on the ticket, and taken his seat in the train, there would be nothing to hinder the company protesting in their turn against him travelling by their train while not agreeing to the sole conditions on which they offer to carry; and if the condition were not an extreme one, as I have supposed, but a reasonable one, there might be a question as to whether the company were bound to take a passenger who openly declared that he would not agree to it. Altogether the remedy of protestation seems to me to be but an indifferent one.

No doubt intimation of limitations of liability and other such conditions might be posted up in some conspicuous way, where they would be much more readily seen than if printed on the ordinary travelling ticket, but even to this the same objections are apt to apply. Placard it ever so conspicuously, people are often in such a hurry at railway stations that they may not see it, and, graver objection still, if they do see it and disapprove, travellers lack the time and don't know how to repudiate a condition put before them not by word of mouth but in printed letters, let it be ever so objectionable to them.

It just, I think, comes back to this. Travellers are practically in the hands of the railway companies. Travel they must, and travel by these companies' lines. The companies have got bills from Government; they have virtual monopolies of the inland carriage both of persons and goods, and the public law of the country should decide what their rights and liabilities are, and entirely disregard conditions attempted to be foisted into the contract either by the carriers or the carried. That, I think, is the only practical view of the matter, and the one that is likely to yield justice to both parties. No doubt, as the Lord Chancellor says, "any person may enter into an *express* contract with the company to take the whole risk of the voyage on himself," or to take any other risk or liability upon himself if he chooses, but



then that should require an *express contract*, or at least the evidence of the passengers agreeing to take such risk should be some *positive act* (not mere omission) on his part which could not be assigned to any other motive, and which would amount to unequivocal evidence that he had both understood and agreed to the unusual condition.

I have to apologize for taking up so much of your valuable space, and am yours,  
CIVIS.

## INIQUITOUS LAW IN ENGLISH BANKRUPTCY.

SIR,—We have recently, as traders, suffered from a most extraordinary anomaly in the English Bankruptcy Law, and for a time we could hardly believe such a law could in the nineteenth century still remain on the Statute-Book. The case is this: A debtor of ours died in London, and a relative of his from whom he had borrowed money was left by will his executor. The executor wound up the estate, and after payment of sick-bed, funeral, and legal expenses, etc., he appropriates the whole remaining assets to payment of his own debt, and informs the other creditors there will be no dividend. Naturally we could not believe he was entitled to so act, and we laid the case before leading mercantile lawyers both in London and Manchester, and only to find he is perfectly warranted in so doing, and that such is the English law.

We need not point out what a door this opens for fraud, and how different the system is from our own in Scotland, where an executor is bound to pay all creditors of the deceased *pro rata* and without preference.

This is one more proof of the urgent necessity for a total revision of the English Bankruptcy Law. MERCATOR.

[We shall refer to this matter in a subsequent number.—ED. *J. of J.*]

## Review.

*The Institutes of Law. A Treatise of the Principles of Jurisprudence as determined by Nature.* By JAMES LORIMER, Advocate, Regius Professor of Public Law, and of the Law of Nature and Nations, in the University of Edinburgh, etc. Second edition. 1880.

THE first edition of this work was published rather more than eight years ago, and it does not speak too highly for the study of jurisprudence among the legal profession in this country that so im-

portant a contribution to the science should have been so slowly disposed of. But probably this is only to be expected in regard to works not adapted to the everyday needs of practice; the study of our municipal law, with its codeless myriad of precedents, more than sufficing to exhaust the time of most practising lawyers. It is at least satisfactory that the present edition has been brought out under the careful supervision of the author, and that the criticisms previously made to parts of his system have received his full attention.

In an introductory chapter dealing with certain definitions and preliminary divisions, the author gives a general statement of the aim of the science, and his reason for adopting the particular terminology he uses. "The branch of science," he says (p. 2), "with the study of which we shall be here engaged, may be described as having for its object the discovery of that law which, by the nature of all rational creatures, and independently of their volition, determines their relations to each other and to surrounding existences, in so far as this law is mediately or immediately revealed to human reason, and realizable by human will under the conditions of human existence in time and space." And a little further on, "Natural law when treated as a science is often called the philosophy of law. But inasmuch as nature is a more definite conception than philosophy, the former epithet is preferable; and for this reason, probably, recent writers seem mostly to have reverted to it. I have adopted the terms 'Institutes of Law,' and 'Principles of Jurisprudence as determined by Nature,' in order to indicate the fundamental relation in which the subject stands to all the departments of positive law."

The author proceeds to develop his system by treating first (Book I.) of the Sources of Natural Law. The word source is used with a double signification—a primary and a secondary. The primary source of natural law is God, the Creator or First Cause of all things. The secondary sources are described as—1st, Direct Revelation, which includes all the various ways in which God is supposed miraculously to reveal Himself to men; 2nd, Indirect Revelation, which includes the teaching of our consciousness on the one hand, and of observation and experience on the other. To direct revelation, upon which a certain class of what one might call clerical jurists (the theological school) were ready to base all positive law, Professor Lorimer does not attach much importance. While admitting that the Deity may have chosen to reveal His will to man in a direct and miraculous way, he does not find the evidence that He has done so sufficiently reliable. But on the indirect revelation of God's law to man through consciousness, he lays especial prominence. In fact this is a fundamental part of the system, and the philosophic question of man's consciousness is treated with great elaboration. But though a wide departure is thereby taken from the objective or sensational school of jurispru-

dence, Professor Lorimer does not dispute the importance of the inductions from observation and the historical method, and his system is an attempt to reconcile the objective with the subjective teaching.

After asserting that human nature is necessarily autonomous—a law unto itself—a long and very valuable chapter is devoted to an examination of the history of opinion in regard to human autonomy, the evidence being sought for in the life of various civilized races of mankind. From a consideration of man's whole nature as the source of law, the author then goes on to deal with the rights and duties which nature reveals to us in relation to God on the one hand, and to our fellow-creatures on the other. In relation to the Creator, though we have duties we can have no rights; in relation to our fellows, however, we have a number of rights. These latter are classified in order: starting from the right to existence being involved in the fact of existence, they culminate in the right to dispose of the fruits of being our property—either *inter vivos* or *mortis causa*. All these subjective rights are summed up in the right to liberty, and to each of them nature tells us that there are objective rights—of our neighbour—which must exactly correspond.

The position with regard to subjective and objective rights as bearing on human relations being established, the question of positive law being necessarily an expression of natural law is dealt with, and the author then passes to a consideration of the well-known distinction between perfect and imperfect obligations, and discusses the negative school of jurisprudence. And he finally concludes his examination into the sources of natural law by a consideration of the doctrine of the identity of justice and charity.

In surveying the system of natural law here laid down as a basis for jurisprudence, one cannot help being struck with the logical consistency with which it is worked out as a whole.

Though agreeing for the most part with the doctrines of that school of jurisprudence which is represented in Germany by Kranse, Professor Lorimer is not to be taken as a mere follower of it. His system is worked out on original lines. Whether or not it succeeds in giving the true solution of the origin and ends of law is another matter. That the unity and personal activity of God is demonstrated as against pantheism is certainly far from being the case. But the discovery of absolute truth in these problems can never be asserted. It is at least a reasoned system, and after all, as Professor Ferrier says, it is more important that a system of philosophy should be reasoned than that it should be true. The system is fundamentally opposed to that of utilitarianism, and the doctrines of Bentham, Austin, and writers of that school are entirely repudiated. Utility, it is said, can never be a *telos* in itself. It must be itself measured by some end or object which it seeks, something that transcends individual or national tastes or sentiments. "Short of nature there is no

science of ends; and to ascribe either utility or inutility to means irrespective of ends is mere baseless dogmatism. If the results which we declare to be useful be identified with the object of nature's legislation, the whole aspect of the affair of course is changed. Our results become ends, and not only they, but all the means that contribute to their attainment may safely be labelled as useful." This, no doubt, is effective criticism. But does not the question come round to this? Do our sources of knowledge enable us to demonstrate any real *telos* for jurisprudence beyond utility? If it be answered, Yes, man's whole nature is in itself the end, for so our consciousness combined with other means of knowledge teaches us, the utilitarian replies, We cannot admit your premises, for we deny that the sources of knowledge on which you rely teach us anything. Professor Lorimer remarks that though utilitarianism has a great stronghold among lawyers in England, it is difficult even there to find a Benthamite *pur sang* who is under forty. And he adds, that among his own students scarcely one has turned up for the last ten years. But we think he will find that there is among lawyers who have spent some years in professional practice, as he will certainly find among legislators, a tendency to adopt the expedient and useful as in themselves sufficient ends for law and legislation. This may be ascribed, and probably with truth, to a want of a proper study and appreciation of the principles of natural law. If so, the present work will be of service in counteracting the tendency by placing these principles in an attractive light.

In tracing the sources of our rights and duties in natural law, Professor Lorimer gives the keynote of his system as it bears on positive law. A man's rights depend upon his capacities. A man has a right to everything which he has the ability to acquire and maintain. The order is first powers, then rights, a doctrine which we find foreshadowed by Plato in his system of ethics. It is the direct opposite of the doctrine of such thinkers as Hobbes, who would affirm that man has a right to everything, and that his natural state is therefore one of war. With Hobbes the order would be, first desires, then rights. But though man has a right to everything which his powers enable him to acquire and possess, still he is limited by rights in his neighbour which nature reveals to him as exactly corresponding to his own, and accordingly it is only subject to this limitation that the doctrine of *might is right* can be taken as a basis for jurisprudence. As an example of the manner in which the author sometimes illustrates the practical bearing of his system we may quote what he says about capital punishment, as the distinction is at the same time brought out between natural and positive law. He is establishing his proposition that the right to be, and to continue to be, implies a right to the conditions of existence.

The question which has been so often asked, whether the right to punish, and above all to punish capitally, be an absolute or a relative right arises, as it seems to me, from a confusion between natural and positive law. Natural law resting on a *postulate* of the rectitude of nature is necessarily absolute. As an end in itself it is to be vindicated for its own sake. Positive law, on the other hand, as its realization in time and place, is absolute only on condition of this realization, and to the extent to which it is effected. If positive law realizes absolute law, it partakes of its absolute character—if I may be permitted the phrase, it is relatively absolute. Now the law which inflicts capital punishment for murder is a positive law. The natural absolute law is "Thou shalt not kill." That law is imposed on us by our nature, and for us, at least, it is an end in itself. The positive law which says the killer shall be killed, is absolute only in so far as it tends to prevent killing, and thus to realize the natural law. It proceeds on the assumption that he who has killed once is likely to kill again; that his example will incite others to kill; and that killing on the whole will be prevented by killing him. If there be an easier and cheaper mode of vindicating the absolute law, i.e. a mode in which the murderer's life can be spared without sacrificing other lives, then capital punishment is forbidden by the absolute law, by which, on the opposite assumption, it was justified; but that is a question which can be answered only relatively, and to which the same answer will not be always and everywhere the true one. The argument against this relative view of capital punishment is that the absolute law, "Thou shalt not kill," applies to society as well as to its individual members, and that capital punishment is thus a violation of an absolute natural law, be the circumstances what they may. To this the answer is, that society stands in God's place as regards its individual members, and that God takes life away in accordance with laws which we assume to be righteous. The final difficulty for the relative argument seems to be that God gives life and society does not. But to admit this as an argument against capital punishment would be to admit it as an argument against all punishment (pp. 219-221).

This is very interesting reasoning, and from the premises adopted is conclusive. Capital punishment is only justifiable where the necessities of the State demand it, i.e. when there would be danger to the other members of the State from suffering the murderer or rebel to live. Where the State is not strong enough to protect society from the perpetrators of crimes otherwise than by executing them, it must do so in self-defence. Our ancestors punished robbers and forgers capitally, and we must not altogether blame them. It was an absolute necessity at one time to resort to such stern penalties in order to keep society together; the mistake was in continuing these punishments after the necessity for them had passed away. It can hardly be said at the present day that our State is not strong enough to protect itself from murderers without resort to the barbarous expedient of hanging.

Some of the arguments which Professor Lorimer adduces in support of his doctrine of natural rights do not strongly commend themselves to us. We may refer, for instance, to his argument in support of the proposition that the right to be involves the right to dispose of the fruits of being, *mortis causa*. The analogy drawn at p. 233 between the death of a testator and the point of time at which a seller of an article completes the sale, seems to us too



finely drawn and inconclusive. "The proprietary will of the testator," he says, "gives place to the proprietary will of the heir just as the proprietary will of the seller gives place to the proprietary will of the buyer." But there is this difference, that in the case of the contract of sale the seller is exchanging for value an article which he possesses or has right to at the time. When the declaration of will is once made, the bargain once struck, the seller cannot from that moment revoke it, the rights of parties *hinc inde* have changed. In the case of a maker of a will it is different. He is disposing of property which is his, no doubt, at the time of the expression of his will regarding it, and continues to be his till his death, which is and continues to be his in virtue of his powers and ability to enjoy it, but which must, and in his knowledge must, cease to be his at a certain time before the expression of his will can take effect.

As a necessary result of his doctrine of rights and duties, Professor Lorimer attaches himself to the positive school of jurisprudence, and refuses to recognise any division of obligations into perfect and imperfect. And in the same way he makes the principles of justice and charity identical; justice being much the same as we find it in the philosophy of Plato—permission to do one's duty. A man gets justice when he is allowed to do his duty.

The objects of natural law are dealt with in Book II. The relation between jurisprudence and ethics is defined, and the identity of the principles of order and liberty, so far as their realization is concerned, established. Some very profound observations are here made on the doctrine of equality of rights, and the errors of socialism clearly exposed. The only sense in which equality is involved in the idea of liberty is "equality before the law." The error of socialism is shown to be in looking too exclusively to the rights of men, and forgetting their capacities and powers. Rights of property must exist, because a man is entitled to everything that the free exercise of his powers enable him to obtain. But it is a law of envy and not of nature which would enact absolute equality. It has been well remarked by Balzac the novelist, that "en proclamant l'égalité de tous, on a promulgué les droits de l'envie." The errors of the *liberté, égalité, fraternité* theories could not be more clearly exposed than by Professor Lorimer.

The two last books (3rd and 4th) of the volume are devoted to a very brief treatment of the sources and objects respectively of positive law, using the word *positive* not in the sense of what is, but of what *should be* enacted law. We can only just say of them, that they represent a logically consistent development from the author's system of natural law, and the views enunciated, especially in regard to the secondary sources of positive law, are of the highest value.

There are one or two inaccuracies of a formal kind which might have been avoided in a second edition. We notice, for instance, the name of the author of the "History of European Civilization" is misspelt Leckie. And there are one or two slight *lapses* in style.

In conclusion we may say that the work is one of which Scottish lawyers may well be proud. It is the only complete treatise on the principles of jurisprudence which this country has for long produced. And whether the system be in itself right or wrong, there can be no question that it is an able exposition, and should succeed in awakening, as we feel confident it has been the author's chief hope it should, a revived interest in the study of the principles of our science.

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## Obituary.

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ROGER MONTGOMERIE, Esq., Advocate, Depute Clerk Register.—It is with the deepest regret that we have to chronicle the death of this gentleman, which took place in Ayrshire on the 26th ult., from an attack of typhoid fever. Entering only a few short months ago upon the office which he held at the time of his death, it was fully expected that his tenure of it would be a long one, and that he would give the public the benefit of his services in a position for which in many respects he was peculiarly fitted. This was not, however, destined to be, and at the beginning of what promised to be a useful official career he has been cut down in the vigour of his days.

Mr. Montgomerie was born in 1828, being the son of Colonel William Eglinton Montgomerie, a cadet of the house which has the Earl of Eglinton for its head. He took his degree of B.A. at St. John's College, Cambridge, in 1851, and was called to the Bar in Scotland in the following year. He held the office of Advocate-Depute during several successive Conservative Administrations, and sat in Parliament for North Ayrshire from 1874 down to the last dissolution. He was then appointed Depute Clerk Register, in succession to Mr. Pitt Dundas, who retired. He has had, however, but short experience of his new office, and both his personal friends and those brought into contact with him in the way of business must regret that his life has not been longer spared to enable him to do some good work in the sphere in which it lay.

We may safely say that not for a long time has there been such a universal regret displayed in the Parliament House as when the news of Mr. Montgomerie's death was known. Without asserting

for him any extraordinary intellectual gifts, it may safely be said that he was a man of good abilities, and did his work as counsel and Advocate-Depute thoroughly and well. His, too, was one of those serene and cheerful natures which spread sunshine all around them; and though his walk through life was not without its own trials and crosses, yet his calm and equable temperament was never for a moment ruffled or discomposed. We do not think that Mr. Montgomerie ever made an enemy: hating display of all sort, he appeared perhaps more shy and indifferent than he really was, though he had not a particle of *hauteur* in his disposition. Whenever one spoke to him his geniality of manner was at once apparent, and his many attached personal friends can bear ample testimony to the warmth of his heart and the generosity of his nature. Apart from mere professional lore, he was a good and skilful charter scholar, and was thus rendered specially fitted for the position which he at last occupied. An accomplished draughtsman, he was always ready with pen or pencil to seize on the passing occurrences of the hour, and we venture to hope that some at least of the productions of his pencil may not be altogether lost to his surviving friends. In mechanics too he was very skilful, and it was while working at a lathe that he received, some years ago, a permanent injury to one of his eyes.

He has now gone from us—taken away inscrutably, just as he had attained to a permanent and honourable post. More learned and more distinguished men may have graced the boards of the Parliament House, but we are using no language of exaggeration when we say that none ever left behind them the memory of such a buoyant cheerful presence. We shall miss for long the rich-toned greeting, the sunny smile, and the warm hand-grasp of Mr. Montgomerie; such a nature is one to be prized while we possess it, and to be mourned for when it is taken away.

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### The Month.

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WE regret to learn that Lord Ormidale has resigned his gown, after having occupied a place on the bench for nineteen years. His Lordship's health has been such as to cause considerable anxiety for some time; we may, however, express a hope that his Lordship may long be spared to enjoy his well-earned repose.

J. York Sawyer, says an American legal journal, was one of the early circuit judges of this State. He prided himself upon his learning and dignity. When Springfield was a small village, he

was holding court there in a log house, and had for his jail a log stable. In passing sentence upon a man for horse-stealing, he said, "If such things were allowed, we could keep no horses in our stables, no cattle in our yards, no hogs in our pens, no chickens on our roosts." A tall, lean, rail-splitter, who was standing in the crowd of sturdy pioneers who had gathered in the log court-house to hear the sentence of the Court pronounced upon the horse-thief, cried out at the top of his voice, "Hit him again, old gimlet-eye, he's got no friends here: we'll stand by you." The judge, feeling that his dignity had been offended, exclaimed, "Who said that? who said that?" The rail-splitter, raising himself head and shoulders above the crowd, said, "This old hoss said it, sire." Judge Sawyer thereupon sententiously remarked, "Mr. Sheriff, take that old hoss and put him in the stable." The sheriff obeyed the judge's order, and the rail-splitter had to remain in the log jail overnight.

*Curiosities of Sunday Laws in America.*—A statute of Massachusetts provides that "whoever travels on the Lord's day, except from necessity or charity, shall be punished by fine not exceeding ten dollars for every offence" (Gen. Stat. c. 84, sec. 2). The genealogy of this statute is traced back to English statutes less objectionable in form, prior to any colonial law. An ordinance of the Massachusetts Colony in 1653 punished both "uncivilly walking the streets or fields," and "travelling from town to town." In 1692 a statute, in some part copying an English statute, provided that "no traveller, drover, horse-courser, waggoner, butcher, higgler, or any of their servants, shall travel on that day or any part thereof, except by some adversity they are belated and forced to lodge in the woods, wilderness, or highways the night before; and in such case to travel no further than the next inn or place of shelter on that day, upon the penalty of twenty shillings;" and all justices of the peace, constables, and tithing-men were required to take care that this Act be observed, "as also to restrain all persons from swimming in the water, unnecessary and unseasonable walking in the streets or fields in the town of Boston or other places," on the Lord's day, or the evening preceding or following. The statute in its present form was enacted in 1836, but it was in substance a re-enactment of a statute of 1791. The above provision has been for a long time almost a dead letter, except when invoked by towns or cities, as a defence to actions by persons travelling in violation of it, to recover for injuries occasioned by defects in the highway; or when invoked by a common carrier of passengers as a defence for any tort or injury sustained by a person so travelling. By statute of 1877 this latter defence was taken away.

There have been numerous decisions under this provision; one of the most interesting of which is *Hamilton v. City of Boston* (14

Allen, 475), where the Supreme Court held that a person walking a short distance in a public highway, simply for exercise and to take the air, on the evening of a Lord's day, with no purpose of going to or stopping at any place but his own house, or of passing from one city or town to another, was not liable to punishment, and might maintain an action for an injury sustained in consequence of a defect in the highway.

The same Court has now rendered two further decisions, which at least show that the statute should not longer be allowed to stand, and be used as a defence in like cases.

The first case was an action of tort, under Gen. Stat. c. 88, sec. 59, to recover double the amount of damage alleged to have been caused by the defendant's dog. At the trial in the Superior Court without a jury, it appeared that the plaintiff, on Sunday, April 7, 1877, was driving his horse and buggy along a public highway in the city of Boston; that while so driving, the defendant's dog jumped at the head of plaintiff's horse and frightened the horse so that he became unmanageable, ran, and overturned the buggy, whereby the same and other property of plaintiff was damaged; and that defendant, previous to such accident, knew of no mischievous or vicious propensity in said dog to attack or harass persons or animals. The defendant offered evidence to show that the plaintiff was unlawfully travelling on the Lord's day, and not from necessity or charity. But the Court ruled and held that these facts would constitute no defence, or prevent plaintiff from recovering, and found for the plaintiff in double the amount of actual damage suffered by him. Exceptions alleged by the defendant have now been overruled by the Supreme Court, for the reason that, "though the plaintiff was illegally travelling on the Lord's day, his illegal act was not a contributing cause of his injury, so as to defeat his right to recover" (*White v. Lang*. Rescript filed July 1, 1880).

The other case was an action of tort to recover for personal injuries received by the plaintiff while travelling upon Willow Avenue, Somerville, upon the afternoon of Sunday, October 28, 1877. At the trial in the Superior Court it appeared in evidence that the plaintiff, living at the West End in Boston, in company with a lady friend residing on Sterling Street, Boston, had driven that afternoon from the latter place to Cambridge to attend a funeral, and that upon leaving Mount Auburn Cemetery the lady asked him if he would take her back by way of Charlestown, so that she could call upon her sister-in-law, who lived on Bow Street; that he assented, and while doing so the accident happened; that in doing so he got a little farther out of his way than he meant to. Upon cross-examination the lady testified that she had not called upon this sister-in-law for some years. Neither the plaintiff nor the lady testified as to the purpose for which such call was to be



made, nor did it appear that the plaintiff had any acquaintance with the sister-in-law. There was a verdict for the plaintiff, and the defendant alleged exceptions to rulings of the presiding judge. These exceptions have now been sustained, the grounds of the decision being as follows: The plaintiff having attended the funeral, and being about to return to his home, extended his journey to Charlestown in order to enable his companion to make a social call upon a friend. This was the substitution of a new and different purpose in the place of that which he had in view when he left his home, and was not justified by any reason of necessity or charity within the meaning of the Lord's Day Act (*Davis v. City of Somerville*. Rescript filed July 1, 1880).—*The American Law Review*.

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## A BALLAD OF THE BAR.

AIR—"Kind captain, I've important information," etc.

*H. M. S. Pinafore.*

O BRETHREN, let me give you information—  
 Sing hey the merry Counsel that ye are!—  
 About the daily walk and conversation  
 Of those who ornament the Junior Bar.  
 Sing hey the merry Juniors,  
 The merry, merry Juniors,  
 The gay and festive members of the Junior Bar!

The burthen  
 of the song.

Their hearts are filled with longing expectation—  
 Sing hey the hopeful Advocates they are!—  
 Their heads are lost in wigs and speculation  
 About their chance of practice at the Bar.  
 Sing hey the jolly Juniors,  
 The jolly, hopeful Juniors,  
 The fresh and blooming members of the Junior Bar!

The young  
 man hopeth.

They climb the Mound with great deliberation,  
 As grave as any Seniors that there are;  
 And make the Hall resound with lamentation  
 About decline of business at the Bar.  
 Sing hey the learned Juniors,  
 The grave and learned Juniors,  
 The underrated members of the Junior Bar!

He despair-  
 eth.

He useth  
strong  
words.

Each one of them in his own estimation  
Is far the ablest Counsel at the Bar,  
And secretly consumes with indignation  
That nobody employs him at the Bar.  
Confound the stupid Agents!  
No men so slow as Agents  
To recognise the talents of the Junior Bar!

He comfort-  
eth himself.

They "go down" early without hesitation—  
There being nought to keep them where they are—  
With signs of evident determination  
To drown their sorrows at some other bar.  
Sing hey the merry Juniors,  
The idle, merry Juniors,  
The would-be busy members of the Junior Bar!

He doeth it  
again.

But dinner is the time for bibulation—  
Sing hey the thirsty Counsel that they are!—  
They need not spend the night in preparation  
To speak to-morrow morning at the Bar.  
Sing hey the jovial Juniors,  
The baccy-loving Juniors,  
The *spirited* young members of the Junior Bar!

He spareth  
the Judge's  
time.

And when they go on Circuit in vacation—  
Sing hey the active Advocates they are!—  
They save themselves and prisoners tribulation,  
By making them plead guilty at the Bar.  
Sing hey the active Juniors,  
The ready, active Juniors,  
The conscientious members of the Junior Bar!

He miti-  
gateth.

The Judges all admire their moderation—  
Sing hey the artful Advocates they are!—  
And give their clients' case consideration,  
Because they don't make speeches at the Bar.  
Sing hey the knowing Juniors,  
The cool and crafty Juniors,  
The able unfeed members of the Junior Bar!

He culti-  
vateth.

And then they take to Agent-cultivation—  
Sing hey the wily Juniors that they are!—  
And press their claims with such determination,  
They end by getting business at the Bar.  
Sing hey the wily Juniors,  
The busy, wily Juniors,  
The long-neglected members of the Junior Bar!

But when at length they get a situation—      He giveth  
 The discontented Substitutes they are!—      it up.  
 Their salary's no fit remuneration  
 For what they lost by giving up the Bar.  
 Sing hey the envious Juniors,  
 The quondam busy Juniors,  
 The disappointed members of the Junior Bar!

## L'ENVOI.

Now this is their position,  
 They are in poor condition,  
 There's really not nutrition  
 For so many at the Bar!

## The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF CAITHNESS.

Sheriff THOMAS.

*County Assessor—General Election.*—A prosecution was, under the instructions of Crown counsel, instituted by the Procurator-Fiscal against Mr. Alexander Mackay, the county assessor, for penalties incurred by him for taking part in the candidature of Mr. Henderson of Stemster at the last election. It was defended on preliminary and other defences, which will be indicated by the interlocutors which have been pronounced in the case. A proof which it was expected would be full of public interest, and would extend over two days at least, was fixed by the Sheriff of the county to be taken before himself on Monday and Tuesday, September 27th and 28th; but at the calling of the case at 10 A.M. on Monday a minute of admissions was tendered by the assessor. This the Sheriff allowed to be received, and then heard the procurators as to the sentence to be pronounced. Mr. Nimmo explained that the breach of the Act of Parliament occurred through enthusiastic thoughtlessness, as Mr. Mackay had been a keen agent at previous elections, and had been urged to take the part he did in last election. Mr. Mackay now regretted his action in the matter, and promised not to give by his future conduct in the office any pretext for imputing political action to him. The Procurator-Fiscal, in respect of this statement, would not ask expenses further than had already been awarded. The Sheriff in giving judgment enlarged upon the offence by one in Mr. Mackay's position—bound to act impartially by all electors. Still as Mr. Mackay was a valuable public servant, and had promised that there would be no repetition of the offence, he thought it consistent with the ends of justice to limit the fine to £5. The following are the interlocutors in the case:—

*“Wick, 9th July 1880.*—The Sheriff-Substitute having considered the petition, with the defences, and heard parties' procurators on the defender's preliminary pleas, for the reason expressed in the appended note, Sustains the first thereof, dismisses the action, and finds the defender entitled to expenses: Allows an account thereof to be lodged, and when lodged remits the same to the auditor of Court to tax and report, and decerns.      HAMILTON RUSSEL.

*“Note.*—If it be true, as alleged by the pursuer, that the defender has been guilty of a breach of duty as assessor in the execution of the County Voters

Registration (Scotland) Act, 1861, and is liable under section 38 thereof to the penalty craved in the prayer of the petition, in the view of the Sheriff-Substitute the cause ought to have been brought before the Court under another form, namely, in terms of the Summary Procedure (Scotland) Act, 27 and 28 Vict. c. 23, by interpretation clause 4 whereof it is expressly set forth that 'all proceedings for trial or prosecution for an offence or for recovery of any penalty under any Act of Parliament by which it shall be provided that offences committed in contravention thereof or penalties thereby imposed shall be prosecuted or recovered under the provisions of this Act.' Such being so, the Sheriff-Substitute has no option but to dismiss the petition, which he has done, with expenses.

"It is unnecessary for the Sheriff-Substitute, in view of the above decision, to enter into the other pleas, being preliminary of the defender. H. R."

This interlocutor was appealed to the Sheriff, and he appointed parties to be heard at his ensuing sittings, and pronounced this interlocutor:—

"*Wick, 3rd August 1880.*—The Sheriff having considered the pursuer's appeal, and heard parties' procurators, Sustains said appeal and recalls the interlocutor submitted to review: Repels the first plea in law for the defender, with expenses against him since 6th July, as the same may be taxed, and appoints parties' procurators to debate the defender's second plea in law to-morrow.

"GEO. H. THOMAS.

"*Note.*—The Summary Procedure Act is expressly made permissive, and the pursuer here seems to have very good reasons for bringing this case, which, so far as the Sheriff knows, is the first of its kind, in the form of an ordinary action.

"G. H. T."

"*Wick, 4th August 1880.*—The Sheriff having heard parties' procurators on the defender's second and third pleas in law, Repels these pleas, and finds the defender liable to the pursuer in the expense of this discussion, as the same may be taxed: Further appoints parties' procurators to attend the Sheriff to-morrow to adjust the record.

GEO. H. THOMAS.

"*Note.*—The defender, as assessor under the Valuation of Lands and Registration of Voters Act (17 and 18 Vict. c. 91, and 24 and 25 Vict. c. 83), is entirely a creature of statute, and the duties imposed are recognised as involving the greatest political impartiality. His duties are *de die in diem* during the whole time he holds his appointment. Section 13 of the latter Act speaks of that officer as acting under these two Acts 'while he continues such assessor,' and makes it a breach of duty in him to register himself as a voter, or to vote, or take part in any Parliamentary election. The dereliction of duty or offence here charged, is accordingly the failure to abstain from acting as one politically interested at the last election of a member of Parliament for Caithness, and the relevancy of such a breach of duty was not called in question. It was only argued that such conduct involved no penalty. But to such a breach of duty it is thought that section 38 of the latter Act applies and assigns a penalty, although it is not felicitously expressed. Such a breach of duty as is here alleged occurred in executing the Act, because the assessor is always in the execution of the Act, and exists as such assessor to no other effect and for no other purpose. On any other construction the anomaly arises, that while the statute declares certain acts of the assessor to be breaches of duty, these breaches of duty are not to be followed by the only penalties which the statute by another section attaches to breaches of duty. It was conceded in argument by the defender, that if the assessor had registered himself as a voter, that would have been a breach of duty in execution of the Act, and involved him in the statutory penalty. But if the assessor were to vote at an election, it was contended that, as that act would not be in execution of the Act of Parliament, he would not be liable in any penalty. Equally where, as is alleged in this case, he takes part in an election, he may, although acting in

the teeth of the Act; do so with impunity. The very statement of this extreme position shows how untenable it is. The Sheriff hence holds an offence or breach of duty against the defender not only to be relevantly stated in this petition, but to involve the penalty which it is craved shall follow on its being proved.

"It should be explained that, as the defender supported the interlocutor by which he got expenses, the Sheriff has the less hesitation in giving expenses to the pursuer, as is usually done to a successful litigant. G. H. T."

"*Wick, 5th August 1880.*—Procurator-Fiscal for himself—*Alt. Nimmo.*—Record closed. GEO. H. THOMS."

"*Wick, 5th August 1880.*—The Sheriff allows to the pursuer a proof of his averments, and to the defender conjunct probation, and appoints the 27th day of September next at ten o'clock forenoon, within the Court-House, Wick, as a diet for taking said proof. GEO. H. THOMS."

"*Wick, 27th September 1880.*—Present parties' procurators. The Sheriff allows the minute of admissions for the defender tendered at the bar to be received. GEO. H. THOMS."

"*Wick, 27th September 1880.*—The Sheriff having considered the minute No. 14 of process, discharges the order for proof, and having heard parties, finds that the defender admits that he took part in the election of a member to serve in Parliament for the county of Caithness, which took place on 6th April last, and thus wilfully committed a breach of duty in the execution of the County Voters Registration (Scotland) Act, 1861 (24 and 25 Vict. c. 83), in respect of which he is liable to be fined under sections 38 and 39 of that Act: Fixes the amount of the fine in which the defender has so rendered himself liable at the sum of £5 sterling, and imposes on him a fine of that amount, and decerns and ordains him to make payment to the petitioner of said fine of £5 on or before the 30th day of September current, and finds no expenses due by or to either party except as already found. GEO. H. THOMS."

## SHERIFF COURT OF PERTHSHIRE.

Sheriff-Substitute BARCLAY.

KENNEDY'S TRUSTEES v. KENNEDY.

*Amendment of record under Act 1876.*—An action was instituted by the executors of deceased drawer against the acceptor of a bill on certain defences against the onerosity of the bill. The Substitute allowed a proof of the non-onerosity. On an appeal, the Sheriff (Macdonald) recalled and limited the proof to writ or oath. The pursuers thereon lodged a minute proposing to amend the record on various particulars. On 26th July the Sheriff-Substitute refused to allow the amendments, assigning the following reasons in a note :—

"The rule introduced by section 24 of the Act 1876 is very important, and in many cases may be useful. But it must be carefully guarded against allowing laxity in preparation of records, and so to preserve them in all their integrity. Before the introduction of the closed record in Sheriff Courts a law plea was similar to a game of chance. It might be likened to a kaleidoscope, and presented a new phase at every stage. It was said that agency was often changed that a new view might perchance be taken and a new fact or plea introduced. There was under former statutes power to add to the record, but under certain stringent conditions, excessive strictness of the rule might often lead to hardships and even injustice. Where there was innocent errors or trivial omissions it was harsh to put a party out of Court when the cause was ready for judgment and compel the litigants to begin *de novo*. The 24th section borrowed from the Court of Session Act, 1868, and assimilating the



Scottish practice to the courts of equity in England, allowed 'the Sheriff at any time to *amend* any *error* or *defect* in records.' Here what is asked is really not to *amend*, but to *add* to the record most important averments. Had the defender asked to open up the record to have these facts introduced he could not have succeeded. The facts averred were not *emerging* since the closing of the record, neither were the *res noviter*, as obviously all were within the defender's knowledge and power. The defender's solicitor seemed to entertain the opinion that the 24th section of the Act 1876 had entirely superseded the former law of opening up records to admit new facts. This would lead to a most dangerous practice subversive of the integrity of records. The Sheriff-Substitute reads the 24th section as allowing the record to be *amended*, but not to be *altered* or *added* to. An error in dates, name, or such trivial matter can be corrected, but not new *facts* supplemented. The record is not said to be opened and reclosed, but the amendments under the 24th section should be made on the margin of the original paper without requiring the opposite party to meet them by affirmation or negation, as is still necessary in cases where the record is opened up or new matter added. In this case the three points would require much lengthy specification by the defender, and which must be met by similar additions to the paper of the pursuer. This, in fact, would be an entirely new record. It cannot be said there is any *error*. If there is *defect*, the fault entirely rested with the defender. The pursuers distinctly stated in their paper that the defender had not given the particulars of his claim, but which he now wishes to supply. Had the case, as first put by the Sheriff-Substitute, gone to a proof *at large*, there might have been some colour for the facts now wished to be put on record. But seeing that it resolves into a proof by writ or oath, there appears no call for a new or amended record. On a reference to oath the deponent is not limited to answer with a categorical reply, but is bound to answer *all pertinent questions*.

"H. B."

On 27th August the Sheriff-Principal (Macdonald) affirmed the interlocutor, and found the appellant liable in costs.

*Act.*—Kippen.—*Alt.*—Mitchell.

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Sheriff BARCLAY.

PEARSON v. ABERNETHY.

*Is a dismissed volunteer liable to pay the Capitation Grant?*—Sheriff Barclay has just given an important decision under the Volunteer Act. The action was raised in the Small-Debt Court at the instance of Captain Pearson, of the 1st Perthshire Rifle Volunteers, against Charles Abernethy, residing at 5 Mill Street, Perth, for the sum of £1, 10s. in respect of the defender failing to make himself an efficient member of the corps during the current year. The case was debated before Sheriff Barclay when the agent for the defender, Mr. John Stewart, pled non-liability for Abernethy on the ground that as he had been dismissed from the corps he was thereby prevented from making himself an efficient member, and was consequently unable to draw the capitation grant for his efficiency. Sheriff Barclay, having taken the case to avizandum, has now issued the following judgment and note, which fully explains the case :—

"Perth, 14th September 1880.—This complaint asks decree for '£1, 10s., being the penalty due by the defender to the pursuer in respect of his failure to make himself efficient as a member of said corps for the current year, and which is presently exigible through his having ceased to be connected with said corps, all in terms of the Volunteer Act and the regulations thereupon framed and founded.' The defence is that the defender was dismissed or discharged from the 1st Perthshire Rifle corps, and consequently was thereby prevented from making himself an efficient member of the corps, so as to enable the body to draw the capitation grant for his efficiency. It was pled that to discern against the defender as craved would in effect be to punish him

twice for the same offence as for which he had been dismissed from the corps. At first sight the defence appears good. A master may dismiss a servant for sufficient reasons, but he could not thereafter maintain an action for loss of his future services which, by his own act, he prevented the servant from rendering. This would be to confound *desertion* with *dismissal*. Many similar cases may be supposed. It rests then with the pursuer to show that under the statutes or rules the defender is liable for the sum sued for. Nothing was stated as to the cause for the defender's dismissal from the corps, but no objection was taken against that act. It was assumed that had the defender made himself efficient the corps would have obtained from the Government 30s. in respect of his efficiency. Nothing appears in the statutes as to efficiency. In the regulations of the corps, dated August 1875, which, it is assumed, have been sanctioned under the 24th section of the Act 1863, there is a clause (page 5) as to the qualifications for efficiency. It is added, 'For each such efficient the corps receives from Government a grant of 30s.' The Sheriff-Substitute has not found in the statutes or the regulations any provision for imposing a penalty (as libelled) for non-efficiency. A following clause deals only with officers and sergeants, which specifies certain periods within which the standard of efficiency must be reached by them, and concludes, 'those failing to gain within these periods *must retire*.' In another Code of Rules dated June 1875 (anterior to the above quoted) there is the third clause to the effect that 'every member who fails to make himself efficient in any year shall pay to the fund of the corps the amount of Government capitation grant thereby lost to the corps. It shall be in the option of the commanding officer to remit the payment.' It is obvious that this is not by way of penalty, but resolves itself into a civil debt. The only plausible ground for the claim is to be found in the regulations of date August 1875. On page 5 it is declared that the commanding officer can discharge any member, and 'the volunteer so discharged is nevertheless liable to pay money due or becoming due by him under the rules either before or at the time or by reason of his discharge.' This clause clearly is limited to sums due directly by the discharged member, and cannot be extended to the capitation grant by Government to the corps, and which might have been gained had the member the opportunity of qualifying himself as an efficient. The Sheriff-Substitute has been informed that, according to rules in other volunteer bodies, the loss of the capitation grant is expressly added to the consequences of a dismissal. In the present case no such rule exists, and its being in other regulations proves the necessity of such express enactment. On the whole, in the absence of any rule sanctioning the claim, the defender falls to be assoilzied from the action. It is proper to state that these notes were submitted to the Sheriff and met with his approval. H. B."

*Act.—Mitchell.—Alt.—Stewart.*

## SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

GARDEN, PETITIONER.—5th Oct. 1880.

*Sequestration.*—Circumstances in which held that the affidavit of a concurring creditor was not sufficiently vouched by the evidence produced along with it.

In this case the Sheriff-Substitute pronounced the following interlocutor and note :—

"*Banff*, 5th October 1880.—The Sheriff-Substitute, having heard parties' procurators and made avizandum, with the petition and documents produced, for the reasons stated in the subjoined note, refuses the prayer of the petition, and decerns.

W. G. SCOTT MONCRIEFF.

"*Note.*—This is a petition for sequestration at the instance of the debtor, with concurrence of his father as creditor, who lodges along with the affidavit of his

claim an I O U apparently granted in his favour by his son. The sole question is whether there is here that proof of the debt required by sections 21 and 49 of the Act of 1856. I have come to the conclusion, not without some difficulty, that this question must be answered in the negative, and consequently the prayer of the petition refused. It is perfectly clear, I think, from the statute that you must have the same amount of evidence in the case of a creditor petitioning or concurring as in that of one who is claiming to vote for the election of a trustee; and the decisions relating to vouchers for voting, on the whole, point to this, that such a document as the one here produced would be insufficient to found a right to vote. Thus in the case of *Cullen*, July 16, 1842, 4 D. 1522, it was held that acknowledgments of debt obtained from the bankrupt on the eve of sequestration in favour of near relatives should not be admitted in evidence. Here no doubt, if we are to accept the date (or rather the latest date, for there are three) which appears on the document in question, it was granted more than two years ago. But then it has been held that such documents do not prove their own date (*Dyce*, May 28, 1847, 9 D. 1141, and *Gascoyne*, December 10, 1847, 10 D. 231). If so, then the opposing creditor may and does urge that this is an acknowledgment of debt to a very near relative, which, in so far as the bankruptcy statute is concerned, has no date, and may have been granted at any time. Not much light is to be derived from a study of the document itself, which is in the following terms :—

*Dufftown*, 15/6 77.

I O U, CHARLES GARDEN.

15/6/77. Forty pounds (£40) sterling.

4/12/77. Forty pounds (£40) sterling.

26/6/78. Thirty pounds (£30) sterling.

£110

26/6/78.

GEO. GARDEN.

It may be said, perhaps, on the one hand, that the different dates and sums are in favour of its genuineness, but on the other its various entries certainly present the appearance of having been written at one time. It is safer, therefore, to go upon the general principles which have been laid down for guidance in such cases, and they lead me to the conclusion that the prayer of this petition must be refused.

W. G. S. M."

*Act.*—Fraser.—*Alt.*—Allan & Soutar.

## SHERIFF COURT OF NAIRN.

Sheriff SMITH.

MACKINTOSH v. DALLAS, M'RAE'S TRUSTEES.

*Sequestration—Ranking—Preference of Poor Rates.*—Alexander Mackintosh, inspector of poor, Auldearn, lodged on the sequestrated estate of Hector M'Rae, Moyness, a claim to be ranked preferably for £14, 13s. 5d. of poor rates. The trustee pronounced the following deliverance thereon :—

The trustee admits this claim to a preferable ranking to the extent of £1, 17s. 3d., being the amount of the assessment for the year ending May 1880; but in respect that payment of the assessment claimed for previous years ought to have been recovered during the currency of the year for which it was levied, and ought not to have been allowed to run into arrear, he rejects the claim to the extent of the balance of £12, 16s. 2d. as preferable, but admits it to a ranking as an ordinary claim.

The inspector, on the part of the Parochial Board, appealed to the Sheriff, and after Sheriff Smith had heard the agents of the parties he issued the following interlocutor :—

*“Elgin, 6th October 1880.—The Sheriff-Substitute having considered the cause : Finds that the appellant, as inspector of poor for the parish of Auldearn, claims to be ranked preferably on the sequestrated estate for the sum of fourteen pounds thirteen shillings and fivepence of parochial rates due by the bankrupt for the period mentioned in the claim commencing in 1874 and ending in 1880 : Finds in law that the appellant is entitled to be so ranked : therefore recalls the deliverance appealed against : ordains the trustee to rank the appellant preferably in terms of his claim : Finds no expenses due to either party, and decerns.*

D. M'LEOD SMITH.

*“Note.—The 28th section of the Poor Law Act of 1845 provides that ‘all assessments for the relief of the poor shall in case of bankruptcy or insolvency be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed.’ There is no limitation or qualification restricting the operation of this provision to the assessments for one year, or any other specific period.*

*“It was contended on the part of the trustee that some of the modes of recovery authorized by the Poor Law Act, and the other Acts referred to in it, were not applicable except for the year current at the time, and that, therefore, in the same way the preference should not extend beyond the current year. This contention is not supported by the terms of these Acts. The 15th section of the Act 52 Geo. III. c. 95, which is the leading statute on the subject, is expressly at variance with any such view. But even if there were grounds for the contention referred to, they would not qualify the general provision which has been quoted from the Poor Law Act, and which establishes the general unlimited right of preference independently of any special mode of recovery.*

*“I have not awarded expenses, because it is so unusual and extraordinary to allow public assessments to accumulate for such a length of time (six years) that an unprofessional trustee or body of creditors—who are in no way to blame for the accumulation—could hardly be expected to deal with the claim without having the question of preference judicially tested.*

*“I may notice that the grounds of the present judgment are similar to those proceeded on by Mr. Sheriff Murray of Glasgow in the case of *Lindsay v. Maclean* in 1878, and reported in the *Poor Law Magazine* of that year. In that case, however, only two years' assessments were claimed for.*

“D. M. S.”

*Act.—Mackenzie.—Alt.—Campbell.*

## Notes of English, American, and Colonial Cases.

**COMPANY.—Directors of—Personal liability—Assignment of property of the company by directors without authority—Representation of authority—Measure of damages.**—By an agreement, headed as between a limited company of the one part and the plaintiff of the other, in consideration of the advance by the latter of £500 to the company, the undersigned three directors of the company agreed to repay the loan in six months, and they thereby assigned as security for the advance the machines and tools as invoiced to him, to be removed by him only in case default should be made in repayment of the £500. The agreement was not sealed with the company's seal nor countersigned by the secretary, nor was there any statement by the directors that they signed on behalf of the company. Default having been made, the plaintiff took possession, but was restrained from dealing with the machines by a perpetual injunction obtained by the company, on the ground that the directors had no power to make the assignment. On action brought subsequently by the plaintiff against the three directors personally, to recover the advance with

interest, and also his costs of defending his possession of the machines against the company:—*Held*, by Lush, J. (on further consideration), that the agreement was to be read as a guarantee given by the defendants personally for repayment of the advance, and that the heading expressing it to be made on the part of the company must be rejected, as inconsistent with the form of signature; but there being no representation that the directors had special authority from the company to assign the machines, and it being incumbent on all persons dealing with directors to know how far under the articles of association their general powers extend, the plaintiff was not entitled to recover the costs of resisting the injunction.—*M'Collin v. Gilpin*, 49 L. J. Rep. Q. B. 558.

**FISHERY.**—*Trespass*—*Several oyster-fishery*—*Navigable river*—*Claim to take without stint*—*Free inhabitants of ancient tenements*.—The plaintiffs, an incorporated body, claimed to be possessed of a several fishery in a tidal navigable river, and in support of their title produced charters of confirmation and grant and proved acts of immemorial user, from which the Court, drawing inferences of fact, held a *prima facie* title to the soil and several fishery to be established, raising the presumption of a legal origin, i.e. a grant before Magna Charta. The defendants claimed, as free inhabitants of ancient tenements in the borough of Saltash, to have from time immemorial, without interruption, and as of right, the privilege of dredging for oysters in the *locus in quo*, from the 2nd day of February to Easter Eve in each year, and carrying away the same without stint, for sale and otherwise. They also claimed to have exercised the above privilege as free inhabitants of the borough, and as subjects of the realm; and they also claimed a general right to dredge for oysters as subjects of the realm:—*Held*, that no right in the defendants, as subjects of the realm, could be established, as it would be inconsistent with a several fishery in the plaintiffs, who would take nothing by their grant, and would be destructive of the fishery:—*Held*, further, that the other claims of the defendants founded on immemorial user could not be established, for that they were made in respect of a fluctuating body, and would have to be supported by the presumption of a lost royal grant, which alone would have the effect of incorporating such body, and that such a presumption could not be made when antagonistic to the existing rights of the plaintiffs.—*Lord Rivers v. Adams* (48 L. J. Rep. Ex. 47; L. Rep. 3 Ex. D. 361) followed. *The Mayor and Free Burgesses of the Borough of Saltash v. Goodman*, 49 L. J. Rep. Q. B. 565.

**PACIFIC ISLANDERS' PROTECTION.**—*Kidnapping Act*—*Offence against the Act*—*Seizure of vessel*—*Reasonable suspicion that offence is being committed*.—By the Kidnapping Act, 1872, it is unlawful for a British vessel to carry native labourers, not part of the crew, without a licence, or to ship natives without their consent, and naval officers may seize “any British vessel which shall upon reasonable grounds be suspected of being employed in the commission of” the above offences. Plaintiff's vessel started on a trading expedition in 1871. Natives were shipped, with their consent, but under circumstances which the Court held not to constitute them part of the crew. During the voyage the Act was passed, and the captain did not hear of it until he was returning to land the natives. Defendant, a naval officer, finding the natives on board, seized the vessel. In an action for such seizure the jury, being asked whether the defendant had reasonable cause for thinking that the vessel was employed in breaking the Act, found a verdict for defendant:—*Held*, affirming the judgment of the Queen's Bench Division, that there was no misdirection, and defendant was not liable: *Held*, also, that the carrying of the natives, having been commenced before the Act was passed, was not an offence against the Act.—*Burns v. Nowell* (App.), 49 L. J. Rep. Q. B. 468.

**MARINE INSURANCE.**—*Ship and shipping*—*Payment by cargo-owner in respect of bottomry bond*—*English policy on foreign ship*—*Loss by perils of the sea*.—By a marine policy effected in England on goods in a French ship it was provided



that general average was to be payable as per judicial foreign statement. On the voyage the master was obliged to take up a loan secured by bond on ship freight and cargo, in order to effect repairs to the ship occasioned by a collision which did not damage the cargo. The ship and freight proving insufficient to satisfy the bond, the cargo was seized, and the owner obliged to pay the deficiency to obtain his goods. On action by the owner of the cargo to recover the amount so paid from the underwriters:—*Held*, that the defendants were entitled to judgment, on the ground that according to English law there was no loss by perils of the sea, and as the policy stipulated for the application of foreign law only as regarded general average, the plaintiff was not at liberty to construe by French law any other portions of the policy so as to constitute the loss a loss by perils of the sea.—*Greer v. Poole*, 49 L. J. Rep. Q. B. 463.

**PARTNERSHIP.**—*Building agreement—Participation in profits—Contract of partnership or contract of security—Bovill's Act.*—S., a builder, who was engaged in building eight houses, under an ordinary building contract, entered into an agreement (dated in 1877) with H., which recited that S. was indebted to H. in the sum of £88, and had requested H. to supply him with 50,000 bricks at a certain price, and to make further advances, and had agreed to enter into that agreement for the purpose of giving security for the repayment of the moneys then owing, and for the 50,000 bricks, and any further advances, and also "certain benefits to H., as a consideration for such advances," and whereby it was agreed that S. would, on demand, pay the £88, the price of the 50,000 bricks, and the further advances; that S. would forthwith proceed with two of the eight houses, and keep accounts of his expenditure in respect of them, which accounts were to be open to the inspection of H.; that S. would deposit his building contract with H. as security; that S. would use the 50,000 bricks in the erection of the two houses only; that S. would procure the leases of the two houses to be granted to the nominees of H.; that the leases should be sold at prices to be fixed by H., and the proceeds applied in payment of the moneys owing from S. to H.; that H. "should be entitled also, as a further consideration, and in addition to the said advances thereinbefore mentioned, absolutely to one moiety of the profit on the said two houses," such profit to be the difference between the net cost price of erection and the proceeds of sale; and that if the proceeds of sale of the two houses should be insufficient to pay the moneys owing to H., and the moiety of the profit before mentioned, the remaining houses should be charged therewith. The plaintiffs had supplied S. with timber for the erection of the two houses:—*Held*, that (independently of the statute 28 and 29 Vict. c. 86, sec. 1) the agreement entered into between S. and H. did not constitute H. a partner with S. in respect to the two houses, so as to render H. liable to the plaintiffs for the timber supplied by them.—*Kelly v. Scotto*, 49 L. J. Rep. Ch. 383.

**ULTRA VIRES.**—*Bank directors—Ordinary business—Guarantee—Deed of settlement.*—B. & Co. (Limited) were largely indebted to the West of England Bank, who held several of the debentures of the company. Mrs. B., for valuable consideration, accepted a transfer from two of the directors of the bank, at their request, of £18,000 of these debentures, provided the bank would guarantee the payment of the interest thereon. The bank gave the guarantee. The company was unable to pay the interest; and the bank went into liquidation. By the deed of settlement of the bank, the directors were empowered to carry on the business of banking in all its branches, and to act as might appear to them best calculated to promote the interest of the bank. Mrs. B. now claimed to be admitted as a creditor against the assets of the bank under the guarantee:—*Held*, that the directors, in giving the guarantee, as part of an arrangement which they considered to be for the benefit of the bank, were acting within their powers; and claim allowed.—*In re The West of England Bank; ex parte Booker*, 49 L. J. Rep. Ch. 400.

**PRIVILEGE OF PARLIAMENT.**—*Member of House of Commons—Committal for contempt of Court—Privilege extending for forty days after dissolution of Parlia-*

*ment—Renewal of motion for committal after cesser of privilege.*—It is only in cases of gross contempt of Court that the Court will make an order for the committal of a member of Parliament. The Court declined to make an order for the committal of a member of the House of Commons during the session of Parliament for non-compliance with an order directing him to pay money and deliver over documents within a specified time. The Parliament having subsequently been dissolved, and the late member of Parliament not having been re-elected at the ensuing General Election, the motion for his committal was renewed within forty days after the dissolution:—*Held*, that the privilege of the late member of Parliament extended over a period of forty days after the dissolution:—*Held also*, that, under the circumstances, the refusal of the former motion was no bar to the subsequent application grounded on the same contempt.—*In re The Anglo-French Co-operative Society*, 48 L. J. Rep. Ch. 388.

**COMPANY.—Shareholder—Untrue prospectus—Winding up—Rescission.**—B. was induced to buy shares in a company by untrue statements in the prospectus. After receiving notice of the allotment, he discovered the facts, and at once applied to the secretary of the company to have the allotment cancelled, which the secretary declined. B. did not pay the sum payable by a shareholder on allotment, but kept the letter of allotment and took no further steps to have the allotment cancelled. The company having been wound up:—*Held*, that he could not now rescind his contract to take the shares, and must pay the allotment money, notwithstanding that the liquidators had already enough assets of the company to pay in full its debts and liabilities and the costs of the winding up.—*In re The Hull and County Bank (Limited), Burgess's Case*, 49 L. J. Rep. Ch. 541.

**COMPANY.—Cesser of business—Shareholder's winding-up petition—Majority of shareholders opposing—The Companies Act.**—A company, which had ceased to carry on business for more than a year, passed a unanimous resolution at an extraordinary general meeting to wait until a change of trade rendered it desirable to proceed with its business or to reconsider its position. A shareholder shortly afterwards presented a petition for a winding-up order on the ground that the company had ceased to carry on its business, which was opposed by the majority of the shareholders:—*Held*, that the Court, having regard to the wishes of the majority, would not wind up the company.—*Re The Middlesborough Assembly Rooms Company (App.)*, 49 L. J. Rep. Ch. 413.

*Seem*, although a shareholder, who presents a winding-up petition, brings his case within section 79 of the Companies Act, 1879, the Court will not make an order in opposition to the wishes of the majority of the shareholders, unless there is something tyrannous in the conduct of the majority, or some mischief or hardship will result to the minority by continuing the company.—*Ibid*.

**COMPANY.—Winding up—Proof for damages for breach of contract—Contract by company to allot paid-up shares—Non-registration of contract—Contributory negligence—Measure of damages—Companies Act.**—Work was done for a registered company, upon a written agreement that it should be paid for in fully paid-up shares to the amount of the usual charges. The company, without registering the contract, allotted to the contractor nominally paid-up shares to the amount specified, and afterwards went into liquidation:—*Held*, that the contract referred to valid paid-up shares, and that the contractor could prove for damages for the non-delivery to him of such shares:—*Held also*, that he was not chargeable with contributory negligence for not registering the contract, though it was in his possession. There was no ascertained market value of paid-up shares at the date of the allotment, but shares were after that date taken up by the public. The company went into liquidation, and calls were made in respect of the allotted shares. The Court assessed the damages for the above breach of contract at the sum eventually called up upon the shares.—*In re The Government Security Fire Insurance Company; Mudford's Claim*, 49 L. J. Rep. Ch. 452.

# THE JOURNAL OF JURISPRUDENCE.

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## PROFESSIONAL GRADUATION.

OPENING LECTURE DELIVERED TO THE FACULTY OF LAW IN THE UNIVERSITY  
OF EDINBURGH BY PROFESSOR LORIMER, NOVEMBER 1, 1880.

COLERIDGE, in his "Church and State"—a book that was better known thirty years ago, and will, I hope, be better known thirty years hence, than it is now—speaks of the professional class, in what was at once its original constitutional and its ideal conception, as "an intermediate link between the national clerisy and simple burghesses." The clerisy he defines as "a permanent class or order, with the following duties. A certain smaller number were to remain at the fountain-heads of the humanities, in cultivating and enlarging the knowledge already possessed, and in watching over the interests of physical and moral science; being, likewise, the instructors of such as constituted, or were to constitute, the remaining more numerous classes of the order. The members of this latter, and far more numerous body, were to be distributed throughout the country, so as not to leave even the smallest integral part without a resident guide, guardian, and instructor; the objects and final intention of the whole order being these—to preserve the stores, to guard the treasures of past civilization, and thus to bind the present with the past; to perfect and add to the same, and thus to connect the present with the future; but, especially, to diffuse through the whole community, and to every native entitled to its laws and rights, that quantity and quality of knowledge which was indispensable both for the understanding of those rights and for the performance of the duties correspondent; finally to secure for the nation, if not a superiority over the neighbouring states, yet an equality, at least, in that character of general civilization which, equally with, and far more than, fleets, armies, and revenue, forms the ground of its defensive and offensive power."<sup>1</sup> The rise of the professional class he thus explains: "As a natural consequence

<sup>1</sup> Page 47, Pickering's edition.

of the full development and expansion of the mercantile and commercial order, which in the earlier epochs of the constitution only existed, as it were, potentially and in the bud; the students and professors of those sciences and those sorts of learning the use and necessity of which were indeed constant and perpetual to the nation, but only accidental and occasional to individuals, gradually detached themselves from the nationality, and the national clergy, and passed to the order, with the growth and thriving condition of which their emoluments were found to increase in equal proportion. Rather, perhaps, it should be said that under the common name of professional, the learned in the departments of law, medicine, and the like formed an intermediate link between the established clergy and the burgesses."<sup>1</sup>

Unless I were to go farther into Mr. Coleridge's system than your time will permit, or than my present object in referring to it calls for, I fear some indefiniteness must attach to the conception which those of you who do not know it already will form of the terms which he employs. I can only say, in a general way, that by the burgesses he means the laity as a whole, as opposed to both the learned and professional classes; and that by the nationality he means that reserve of the national wealth which he says the Teutonic races, like the ancient Jews, set apart for the maintenance of those who were to minister to their spiritual life, whether secular or religious—to those whom in the passage which I last quoted he calls the clergy. "I do not assert," he says, "that the proceeds from the nationality cannot be rightfully vested except in what we now mean by clergyman, and the established clergy. I have everywhere implied the contrary. But I do assert that the nationality cannot be rightfully, and that without foul wrong to the nation it never has been, alienated from its original purposes. I assert that those who, being duly elected and appointed thereto, exercise the functions and perform the duties attached to the nationality, possess, collectively, an inalienable, indefeasible title to the same; and this by a *jus divinum*, to which the thunders from Mount Sinai might give additional authority but not additional evidence."<sup>2</sup> In Scotland much of the nationality was alienated from its original purposes at the period of the Reformation, and if any one doubts that "foul wrong" was thereby done to the nation he has only to pay a visit to Oxford, as I did the other day. Had our Reformation been conducted with the common sense and common honesty for which we in general get credit, St. Andrews would now have been the Oxford of the north. With us private munificence is now slowly and inadequately setting this mischief to right; and I rejoice to see that those great colonies, into which so much of the life of our race is passing, exhibit a sense of their responsibilities in this respect which seems scarcely to exist in the mother country.

But it is not with this that we have to do for the present, for Mr. Coleridge says, rightly I think, that in a country which has reached

<sup>1</sup> Page 53.

<sup>2</sup> Page 54.

the stage of material development to which this country has attained, the professional class, as such, no longer requires the aid of the nationality for its support.

What then is implied in the proposition that the professional class still forms a link between the clerisy and the burgesses or general laity? In what respect do professional men who are to live by fees, differ from burgesses who are to live by gain? If the prosecution of learning is still to be handed over, as a necessarily unremunerative function, to those who are to share the nationality, in what respect are professional men, who are to be excluded from the nationality, bound to regard themselves as members of the learned class? Now the relation of the professional man, or scientific practitioner, to the teacher and cultivator of science seems to be this—the former may accept, without question, the teaching of the latter, but, on the penalty of renouncing his own scientific position, he must accept it, and apply it to the practical needs of mankind not as baseless, or to him unintelligible dogma, but as rational doctrine which he himself has intellectually apprehended, and the truth of which he perceives. Professional men, as such, are not called upon to prosecute the investigation of natural laws. In the world of matter, in the world of mind, and in the social world, that task belongs to what, as opposed to the professional, I think we may call the professorial class. But, in order that natural laws may be professionally applied, so as to secure to the patient, or the client, or the public, the whole practical benefits of the stage which their investigation has reached, the steps by which this investigation was carried on must have become familiar to the physician or to the lawyer. It is the same link that binds practice to theory, which binds professional to scientific activity. At the other end of the chain from that at which the practitioner received the scientific result as doctrine, he transmits it as dogma. In his strictly professional character he is not called upon to explain it, nor is the burgess or layman who receives it bound to understand it or to judge of it. I by no means say, of course, that the professional man may not be a cultivator or teacher of science or of philosophy, or that the burgess may not be a philosopher or a man of science. Every man may be his own prophet, just as he may be his own priest. All that I say is that the burgess, as such, is or ought to be freed by the professional man from responsibilities from which the professional man is not freed by the cultivator of science; because, if the professional man blindly accepts the results of scientific investigation, he is very likely to misapply them, and his practice will always be shiftless and unelastic, whereas the burgess will, in general, do more wisely to accept them than to criticise them.

Now, if the relation which I have here stated as subsisting between these three classes of persons be the true one, the question arises, By what means is the burgess or layman to be satisfied that the results which he accepts from the practitioner at second hand are the true results of the scientific investigations which he does



not himself criticise, and which he is not bound to understand? It is here that the necessity for an external guarantee for the scientific acquirements of the practitioner becomes apparent, and the only adequate guarantee which the professional man can offer, and which the burgess can accept, is *graduation in a university which represents the latest stage which scientific investigation has reached*. By far the most important function of graduation, in my opinion, is that of a test of professional efficiency, which shall imply, in the first place, the possession of that measure of preliminary culture which shall render the reception of scientific knowledge possible; and second, of that scientific knowledge which bears directly upon the profession which the practitioner claims to exercise. It is entirely to mistake the object of ordinary academical degrees to regard them as guarantees for the possession, on the part of their holders, of that originality and mental fertility which is requisite for independent scientific activity. Where a classification of degrees is attempted, and "honours," as they are called, are awarded to students of exceptional merit, it is possible that this latter object may to some extent be attained. But whether this be possible or not is comparatively of little importance. These higher and rarer intellectual qualities, when they really exist, will find far surer and worthier spheres of manifestation than examination papers. The most successful examination can scarcely afford more than a presumption of their presence, and where it has been permitted to count for more than this, it very often turns out that a mistake has been committed, and that a man has been credited, in early life, with capabilities which he does not really possess. When early appointments must be made, examinations form often the only grounds of selection amongst the candidates. We must, in such cases, be contented with presumptions, and, for the first ten or fifteen years after graduation, a good degree affords, no doubt, a very valuable presumption in favour of its possessor. But degrees, like other presumptions, wear out if they are not followed by proof; and when I hear of a man of forty or fifty who is still known only as a "Senior Wrangler," or a "Double First," I have very little hope of him. If, during all these years, he has failed to avail himself of the opportunities which his degree must have afforded him, the presumption begins to turn against him; the degree becomes an indication, not of what he is, but of what it was hoped that he might have become. The true light in which to regard an honours degree, as it appears to me, is as a claim on the part of its holder to be ranked, at once, as a candidate for admission to the clerisy or learned class, and as a prospective inheritor of the nationality. It would be highly desirable if, in our universities, opportunities, similar to those afforded by the German universities, could be given to this class of students, of continuing to cultivate the branches of study in which they had distinguished themselves, and even if they were permitted to teach them within

our walls ; and, to some slight extent, this has already been effected by our fellowships and tutorships. But such recognition must be considered only as tentative. A permanent place in the learned class can be claimed only on a proof of powers that are more than receptive, or even retentive. For this purpose independent scientific capacity is requisite,—a man must be able to swim in the sea, as well as in the plunge-bath of his *alma mater*,—and the only means by which the display of such capacity can be facilitated is by forming a learned career which shall ultimately offer material advantages in some degree corresponding to those offered by the professions. I say “in some degree,” for the Muses will own no suitor who is not willing to make sacrifices for their service. But when the sacrifices which they impose are, as in this country, penury, or celibacy, or both, their terms are too hard for mortal men. Without permanent endowments of some kind corresponding to what Coleridge called the Nationalty, a learned class is simply impossible, and, till this indispensable requisite is supplied, the appointing of Royal Commissions and the framing of new schemes for selecting professors and examining students, in so far as science is concerned, is mere waste of time. A very few years ago Dr. Aufrecht, one of the greatest comparative philologists and Aryan scholars in Europe, was carried off from us in consequence of the inadequacy of an endowment which we owed to Dr. Muir’s munificence, and which the State had failed even adequately to supplement ; and we have just missed Dr. Wright, the greatest Semitic scholar in this country, who was willing and anxious to have come to us, from a similar cause. Such poor and paltry savings are contemptible, and very deplorable in a country that recklessly throws millions away on doubtful and mistaken wars.

But it is only indirectly and partially that this defect in our academical system affects the professions. As a mere teaching institution, our University is tolerably complete, even in the Faculty of Law ; and there is, consequently, no reason why we should not develop our system of ordinary graduation, and avail ourselves of it for professional purposes. In the kindred profession of medicine this has long ago been effected, and in the theological profession the degree of B.D. promises to become, in so far as acquirements are concerned, a test of suitability for the sacred ministry, which will be accepted, indiscriminately, by the Established Church, and by the various sects of Protestant dissenters. Whether we shall have greater physicians or greater theologians in the future than we have had in the past will depend partly on the condition of our universities as scientific and learned institutions, and partly on the kind of men whom it may please God to send into the world. But we may reasonably hope that, at no distant period, there will be neither a physician nor a clergyman in this country who does not possess the general culture and special acquirements requisite for a becoming discharge of the

duties of his position. Can we say the same for the profession of the law? That it has now, as it has always had, and, in a country at the stage of civilization we have reached, cannot fail to have, many highly cultivated as well as highly gifted members is unquestionable. But, as regards the profession as a whole, in so far as the test of graduation which has now been applied to it for seventeen years affords evidence of its condition, I must confess, though not without signs of improvement, it is still scandalously low. It is very undesirable that you should be ignorant of facts which others know only too well; and I shall therefore state to you the results of the experiment of legal graduation which was begun by the University Commission in 1864.

UNIVERSITY OF EDINBURGH—GRADUATES IN LAW.

YEAR.	LL.B.	B.L.
1864 . . . . .	1	0
1865 . . . . .	1	0
1866 . . . . .	4	0
1867 . . . . .	1	0
1868 . . . . .	2	0
1869 . . . . .	1	0
1870 . . . . .	6	0
1871 . . . . .	6	0
1872 . . . . .	2	0
1873 . . . . .	0	0
1874 . . . . .	1	0
1875 . . . . .	1	1
1876 . . . . .	1	1
1877 . . . . .	2	2
1878 . . . . .	2	2
1879 . . . . .	1	7
1880 . . . . .	4	6
	<hr/> 36	<hr/> 19

In the sister University of Glasgow, the numbers from the commencement have been, LL.B., 13; B.L., 27; both of which are beyond our mark when we consider the disadvantages under which Glasgow has laboured.

Even with us there has been, as you will see, a slight advance in numbers; but this advance has been gained chiefly in consequence of the institution in 1875 of the degree of B.L., with a lower standard both of general and professional knowledge. As regards the higher degree we appear to have attained the maximum of half-a-dozen in 1870 and 1871. Even taking the two degrees together, we had last year only 10 graduates out of 373 students. Attendance on the law classes rarely exceeds three years, so that of these 373 students, 100 at least have, no doubt, since found their way into one or other of the various branches of the profession. By this computation 90 per cent. of our lawyers this year have gone forth into the world carrying with them no token of the link which ought to bind them to the learned class, whereas one-half of them, at least, ought, in my opinion, to have been graduates.

The facts being thus unsatisfactory, it becomes the duty of those who desire to promote legal graduation to inquire into the causes which have led to them, and to see whether or not they can be removed. Why is it that these degrees have proved so little attractive to students? When I put this question to my young friends, the various answers which I receive may all, I think, be summed up in a single French phrase, "Le jeu ne vaut pas la chandelle"—"The degrees are not worth the trouble they cost." In addition to the labour of getting up the examinations, "the degrees," they tell me, involve delay and expense, "and so long as we can get into the profession without them why should we care for them?" To this objection, I fear, the only adequate answer that can be given must come from the side of the profession. But this answer to a limited extent has already been given. The Bar, though declining absolutely to exact it, now opens its doors without examination to candidates who present the LL.B. degree. When the degree of B.L. was instituted this liberal and enlightened measure on the part of the Bar was followed, though with still greater caution, by the Solicitors; and that degree now admits to the profession of Law Agent, provided an examination in the practice of the Court is passed to the satisfaction of the examiners under the Law Agents Act. The branch of the agent profession, however, which is generally regarded as the highest, I mean, of course, that of W.S., has as yet made no advance in this direction. In consideration of a degree, whether in Law or in Arts, the Writers to the Signet, I understand, strike off two years from their period of apprenticeship; and an applicant holding the Edinburgh degree of LL.B. is exempted from attending a second course of lectures required from other applicants. But, as regards their law examinations, they give no value whatever to either Law Degree. This fact is unaccountable, as well as regrettable, seeing that there is no branch of the profession of the law, not even the Bar, to which so large a proportion of young men come to whom the expense of the degree, and even the delay which it occasions, might well be matters of indifference. We cannot expect that, in the mean time at any rate, the Writers to the Signet, more than the other branches of the profession, should impose the degree; and—if their law examinations are of so peculiar a kind that they cannot intrust them to the University, even with the guarantee which the presence of one of their own body in the Professor of Conveyancing ought to afford them—the proper course to adopt, as it humbly appears to me, would be to strike off another year from their apprenticeship in virtue of the degree of LL.B., and then to limit their own examination to subjects bearing directly on practice. With the degree of B.L., the Writers to the Signet, if they wish to preserve their *prestige*, ought, in my opinion, to have nothing to do. The advantages both in point of general culture and of depth and thoroughness of professional knowledge which the LL.B. degree implies, would

be cheaply purchased at the additional cost of money and labour which it involves. I say this specially to the Writers to the Signet, but I do not say it to them by any means exclusively. There is no calling success in which depends more on the personal respect and consideration attaching to the practitioner than that of a law agent in a provincial town. The character of the business in which he will be employed will often be determined more by the question whether or not he is a gentleman, than whether or not he is a sharp or even a skilful practitioner. A reputation for the latter qualities may, possibly, be of more value in the Sheriff Court; but it is not in the Sheriff Court that country practitioners grow rich and prosperous, and if your object be to be employed in the management of landed estates and of family affairs, you will find that a knowledge of the "tricks of the trade" is by no means the kind of knowledge of which you will be most in want. Social will be requisite as well as professional qualities, and, though our academical system does not communicate social training directly, it lays the foundation for its acquisition by the intellectual culture which it communicates. An English vicar was explaining to me, the other day, the way in which clergymen in England contrive to maintain a high social position often on very slender means, and he made use of an expression which in this connection I cannot do better than repeat to you. "The cheapest thing," he said, "is to be a gentleman." I think you will find that with a view to your personal development, and through it to the vindication of your professional position, the cheapest thing you can purchase in the long run will be the degree of Bachelor of Laws.

So much, then, for the professional inducements to graduate. From the academical side all that we can offer you directly is the privilege of being permanently attached to the University by becoming members of the General Council, and thus enjoying that exceptional constitutional recognition which is now conceded to the members of the learned class.

I do not suppose there is any alteration in the mode of conducting the examinations for these degrees which would render them either less burdensome or more attractive; but there is an alteration in the direction of giving greater elasticity to the higher degree by widening the range of subjects for examination and rendering some of them optional, to which your learned Dean and I attach much importance, and which others of our colleagues regard with favour. Scientific jurisprudence, as you no doubt know, lies at the root of sound legislation just as at the root of sound jurisdiction, and as the number of members of our profession who devote themselves to politics is increasing, and, judging by the experience of other countries, will probably continue to increase, it has occurred to us that the degree of LL.B. might be better adapted to the purposes of this class of persons by opening a double portal to it, the one of which should have a political character, whilst the other



remained, as at present, strictly professional. With a view to making the public aware of the intimate relation which subsists between the profession of the law and the public service, and the extent to which the teaching of the faculties of law in Continental universities is directed to social and political subjects, Professor Mackay has contributed to the *Journal of Jurisprudence* a series of very able and interesting papers, to which I beg to call your attention. Should this suggestion for the modification of our system of examination for the higher degree be adopted, the chief change would consist in the substitution of Political Economy, on the political side, for Conveyancing, which is a strictly professional subject; and, perhaps, in a diminution in the period of attendance, and the corresponding examinations in Scottish Law and Civil Law, in consideration of an extension of the scope of historical study, and the addition of one or two of the branches of physical science, such as chemistry, geology, or agriculture, which bear most closely on public interests. The value of these latter studies for political purposes has been strikingly brought home to us by the career of our distinguished representative, who owes, in no small degree, his position as a statesman to his eminence in the sciences which bear on the economy of the State.

In countries in which centralization prevails, whether their political constitution be despotic or democratic, the examinations which admit to the public service are generally conducted by the State itself; and in Germany, more especially, as it becomes more and more centralized, the bureaucratic official takes the place of the academical graduate. The training which the universities communicate being thus tested by the State, it loses its free scientific character, and tends in many directions, I fear, to degenerate into cram. But, as Lord Reay so strongly insisted on, in his interesting and important address to the Social Science Association, this is neither a centralized nor a bureaucratic country, and we fervently trust may never become either. Our official, like our learned and professional classes, has been the spontaneous growth of our local life, and, as such, has been able to take cognizance of local feelings and interests, to an extent which must always be impossible to a centralized bureaucracy. We ask, it is true, and, if need be, shall insist on obtaining for our learned institutions the share in the general revenue to which our contributions to it entitle us; but we should be sinning against the whole traditions of our country, and of our race, if we intrusted to the central government the duty of selecting and setting apart the class of men from whom our officials were to be chosen. The question with us is not between State examinations and academical examinations, but between academical examinations and examinations by professional bodies; and my objection to the latter is that the tests which they apply can scarcely be more than technical. They may find out who is the better lawyer, but scarcely who is the better man; and the better man, in the end, will prove the better lawyer also.

## LEGAL EDUCATION AND THE SCOTTISH UNIVERSITIES.

THE future of the Scottish Universities is secure. Unless some unlooked-for revolution in the conditions of society or of education were to occur, they must continue to increase; for they have addressed themselves from the time of their foundation, and with new vigour from the time of the Reformation—which was the date of the foundation of the University of Edinburgh, and of a new order in its three elder sisters—to the solution of the problem how the benefits of the higher education may be imparted to the largest number. They have their defects. He is no friend to their welfare who conceals them. And if their friends were unwise enough to conceal them, their critics and rivals would not allow them to be hid. The principal cause of their excellence contains a source of danger; for it is obvious that there is a risk that learning may be sacrificed to popularity. The accusation is sometimes made that this has been the case. It has been said that they give a tincture of learning to the many, and make them suppose themselves wiser than they are; but that they produce no thorough scholars, and no learned class. It lies with their students to refute this accusation, and in the long run it may be safely left to them to do so. Certainly no institutions open wider the gates of knowledge or leave to those who enter more freedom to choose amongst its many mansions that which is best adapted to their talents and circumstances. They impose upon the student no tests. They are free to all the world. The citizen of America and the native of Asia may, and do, meet our own countrymen from England, Ireland, and the colonies, as well as from Scotland, in their classes. If they proved themselves the equals or the superiors of the Continental Universities, there is little doubt they would be resorted to also by some Continental students, as the Universities of Germany are by some English and Scottish students, and as one, at least, of the Scottish Universities, St. Andrews, was by some foreign students in its earlier days. They rely upon the fewest possible rules of discipline. They appeal to that inborn desire of knowledge which is in some degree in all men, and which impels them in proportion as they possess it to make that knowledge comprehensive, thorough, and accurate.

It is impossible to use language of equal confidence with reference to the future of University legal education in Scotland, including under that term the considerable part of political education which is concerned directly or indirectly with law. Here also there is no reason to be despondent. We may look with hope towards the future, but that hope depends upon considerable exertions being made to give to this branch of education its legitimate sphere and proper direction—exertions in which not

merely the students and professors, but also the governing powers and benefactors of the Universities must combine.

If University legal education were to be exclusively or even mainly education in Scots law, its future has a certain and perhaps not far-distant term, and even in the present it will be of much less use to the country than it might be. The prudent reformers of the Scottish Universities foresaw this when they considered the condition of legal education at the time of the University Commission under the Act of 1858. The recent University Commissioners have in some of their recommendations shown themselves disposed to confirm and extend the dispositions of the former Commissions to that effect. The consequence is that there is now in the University of Edinburgh a Faculty of Law more completely organized than in any other University of the United Kingdom, although its total endowments scarcely equal one of the Oxford Chairs.

If the recommendations of the last Commission are carried into effect, the University of Glasgow, the second city as regards population in the United Kingdom, will be placed, as it ought to be, on an almost equal basis as regards its Law Faculty; for to the existing staff of Professors of Scottish Law Conveyancing and Medical Jurisprudence there will be added a Professor of History, whose duty it will be to pay attention in his lectures to Constitutional Law, and Lecturers on International Law and Civil Law. When these recommendations receive effect, and a healthy emulation is produced between the Universities which shall give the best legal education, it is not chimerical to hope that Scotland might become as celebrated for its instruction in law as it at present is for its instruction in medicine. To attain this new endowments will to some extent be necessary. It would be foolish to overlook that fact. We have learned by long experience the evil of an inadequately endowed professoriate. But something may reasonably be expected, not in Glasgow only but in other Universities, from the Government. The Conservative party, which originated the Commission, has thereby incurred a special responsibility to carry out its recommendations; and whatever may have been said by some individual Liberals like Lord Sherbrooke, the leaders in whom the Liberal party have confidence have never shown themselves blind to educational reform. Something also may be hoped from the liberality of private benefactors. Lawyers have not yet done so much as other classes of the community to promote that branch of education in which they are specially interested. It is true, indeed, that in spite of what is sometimes said as to the largeness of their remuneration, the collective profits of the legal profession are small when compared with those of merchants and several other classes, and are in a larger degree perhaps than in other kinds of business concentrated in the hands of a few, but lawyers are usually credited with prudence. Notwithstanding the difficulties they have to encounter at the outset of life, a prosperous

lawyer is, after all, no such rare phenomenon. Amongst prosperous lawyers it should not be a rare phenomenon that some should be found imbued with public spirit and a desire to aid the prosperity and reputation of the calling to which they owe their own.

Let us suppose what is, we may hope, not so far-off a supposition, that in two at least of the Universities of Scotland there was an adequately equipped and fairly endowed Faculty of Law, and let us ask, Who should that Faculty teach, and what should it teach?

In other words, What should be the relations between the University and Education in Law?

In endeavouring to answer these questions we have the advantage of three models which without much difficulty we may place before our eyes. There are in Europe three distinct systems of legal University education—the system of the English University; the system of the Continental University; the system of the Scottish University. The second system is correctly described as the system of the Continental rather than the German University; for though it is to be found in Germany in greatest perfection, it is in fact, in its general features, common to all Continental countries—to France and Belgium, to Holland and Switzerland, to Italy and Russia, as has been shown in a series of papers contributed to this Journal<sup>1</sup>—as well as to Germany, a country to which we sometimes give too much praise for its educational arrangements, if we sometimes deny what is due to it.

The legal education of all European countries started from the mediæval University, that great legacy which almost compensates for the *damnosa hereditas* of the corruptions of the Church, and which will survive their final overthrow as it has survived their partial reformation. It was confined to the study of the Civil and Canon Law. It received some additions and subtractions peculiar to the separate countries, and there was in particular a certain amount of study of the Customary Law of the Teutonic or of the Latin races. But in the main the massive foundations of the law of the Roman Empire, on which was reared the less massive, but still, in spite of grave faults, the noble superstructure of the Canon Law of the Roman Church, continued for many centuries after the fall of Rome to be the common law of Europe. It was also the common basis of University legal education. It was so even where, as in England, out of the customs of the Anglo-Saxons and of Norman feudalism there grew up another common law which was the not unworthy rival of that of Rome.

Of the intrinsic value of the Roman law no more striking testimony could be given than that even now, when it is almost wholly superseded in practice, its principles must still be studied by any one who would make himself a complete lawyer or competent jurist.

<sup>1</sup> "Notes on Education for the Service of the State—Russia," *Journal of Jurisprudence*, 1878, p. 297; Germany, p. 344; Holland, p. 626; Belgium, *Journal of Jurisprudence*, 1880, p. 393.

But the Roman Law cannot any more than the Romish Church cope with the new problems of the modern world. It had its roots in philosophy—the philosophy of the Stoics. If it had not it could never have endured so long as it did; but philosophy, though it constantly repeats the old questions, has been again and again revised since the days of Zeno and Chrysippus.

To whichever of its modern schools we belong, we cannot accept the dictum to follow nature as a sufficient basis for the philosophy of law. The definition of justice and law in the first title of the Institutes of Justinian are admirable in their way, but when justice has been defined as “the constant and perpetual will to render to every one his right,” we still require to know what the rights of individuals are; and when jurisprudence is described as the “Science of the Just and the Unjust,” we still have to ask what is just and what unjust. The Corpus Juris supplied a sufficient answer for the purposes of the Roman lawyer when it explained, as it did, with great completeness and fulness of detail, what were the rights of individuals under the Roman law, and what acts that law considered as just and unjust. But that answer is insufficient on more than one ground for the present time, and modern Europe, not to speak of a future more or less near. The Roman law had its forms relative to a system of government which aimed at being to a large extent an empire over the whole known world. This system has not lost its influence over some minds imperfectly educated in the principles of justice and of liberty; but it is not the system of modern Europe or America, nor, so far as we can see, is it the system which the future will accept as permanent in any quarter of the globe. On the contrary, an international instead of an imperial system, and national self-government instead of personal or despotic government, will be the rule. The Roman law, too, had a noble language as the medium for its expression, which for a longer time than its empire lasted seemed destined to be the universal language of civilization. But this language is now nowhere spoken, and it is not even understood by the great majority of those who are to be subject to modern laws. Latin, therefore, cannot be the language of law and jurisprudence in the future, and one of the tasks of legal education is to adapt the modern languages, so that they may be the fit instruments for legal expression.

England has the merit of having first of the nations of Europe discovered that however great its merits, it was necessary to abandon Roman law. This was due partly to its insular position, partly to an antagonism to the Papacy, which began long before the Reformation, but chiefly to the sterling worth of the customs of the Anglo-Saxon branch of the Teutonic race, and the high legal skill of the Normans, who in this, as in some other respects, may be deemed the Romans of the mediæval world. But the fact that the English common lawyers abjured the allegiance of Rome



while it was on the whole beneficial had one unfortunate result. It divorced English legal education from the English Universities. The study of the law fell into the hands of the Inns of Court or Legal Corporations. By these it was conducted with exclusive reference to the Courts. It was carried on almost exclusively in chambers, along with occasional attendance in the Courts, and consisted in that part of it which was of most real value, however contracted, in copying conveyances and framing pleadings. It devoted itself for many centuries with all the strength of English perseverance to the study of cases, and neglected with all the strength of English prejudice the study of principles. A good illustration of its character was the practice, now fallen into desuetude except in America, of holding Moot Courts. In these the young lawyers imitated the proceedings of real courts, just as young students in debating societies imitate the proceedings of Parliament. The instruction in law in the University continued, on the other hand, to be practically confined till the middle of the last century to almost nominal lectures on the Civil Law. These being of scarcely any practical value, were despised even by students, and altogether ignored by lawyers. One consequence of the English plan of legal education was to produce a system of law admirable in parts; in all matters touching the liberty of the person, well adapted to its purpose; in most matters relating to mercantile law, excellent; but as regards its form, a monster; as regards its arrangement, an undigested chaos of legal matter, good, bad, and indifferent. Blackstone, in the middle of last century, did probably as much as any one man could have done for the elucidation of this system. It is significant that he was one of the few English lawyers of repute closely connected with the University. His Commentaries are, in fact, an amplification of lectures delivered as Vinerian Professor at Oxford. No one but an English lawyer could have done the work in the way he did it, but no one but an English lawyer could have done it at all. In spite of all the criticism of Bentham and his school, the work of Blackstone marks a stage in the development of English law which was not retrograde but progressive. But though the foundation of Viner, and another in honour of Blackstone, introduced a modicum of English law into the English University system, legal education still continued to be pursued almost exclusively in the London Inns, and the mode in which it was then pursued was fatal to its character as a liberal education. It might and did frequently produce good judges, advocates, and magistrates; but they owed their eminence for the most part to their own talents, and not to the system of their education. That system cramped even some of the best men. It shut out, too, from all legal training persons destined for the service of the State, with the exception of a gradually decreasing number of country gentlemen who aimed at Parliamentary life or the discharge of magisterial functions. The system was so technical and exclusively directed to practice in the Courts, that such persons, instead

of studying law, generally studied London society. Their picture has been drawn in the dramas of the Restoration period and in the *Spectator*. A Templar became the synonym for the man of pleasure about the town.

Only within our own memory has the attempt been made again to associate legal education with the English Universities, and it has been made in a manner that deserves special attention, because one of the proposals of the late Commission is that the Scottish Universities should copy one, and that curiously enough not the latest, form of the experiments of Oxford, by making law and history one mode in which the degree in Arts may be taken. The experiment of the Oxford law and history school as one department of the education in Arts, and one mode of graduation in Arts, only lasted a few years, and now law and history have been separated into two schools, both retained within the Arts curriculum. It was an experiment which would never have been made had there been any clear notion of the scope and organization of legal education, and it is to be hoped that Scotland will not repeat the failure of Oxford.<sup>1</sup>

The reason of that failure is not obscure. History is not the basis of law, although it is a valuable adjunct to legal education. The basis of law is philosophy in general, and in particular moral and political philosophy. It is from these branches of study we must start, if we would organize aright the system of legal education. It is in these branches of study that the student should be first grounded before he proceeds to the study of positive law. But these are just the branches which the English system has removed from the sight of the student of law, and placed in a separate school or department. The consequence is that in England there has not been founded a living and fruitful school of law, there has only been added an inferior form of education in Arts, which is, and always will be, regarded as inferior. The reproach of an eminent French jurist, Lermnier, is almost as true as when it was written in 1835, "L'Angleterre se trouve en ce moment entre ses praticiens obstinés et l'école de Bentham; pour la science du droit proprement, dit-elle, y sommeille toujours."

On the Continent the course of legal education fortunately took another direction. The Continental nations were behind England in discovering the inadequacy of the Roman law to the requirements of a modern state. But they at no time fell into the error of removing legal education from the University. The Roman law had, in fact, a philosophical substratum, which gave it a better arrangement, and made it a more fit instrument of a liberal education than the English, and though it was long studied, as it is still to some extent, with a too exclusive partiality, it was perhaps no great disadvantage that the great lawyers of Italy, as the Glossators and Bartolus; of France, as Cujas, Domat, Pothier; of Holland, as

<sup>1</sup> It will be understood that no disparagement is intended of the Oxford School of History, in which able teachers have produced able scholars.

Grotius and Voet; of Germany, as Hugo and Savigny, have been its devoted disciples. The Continental Universities and the Continental lawyers were in consequence better prepared for the reorganization of legal education at the close of last century, which has borne such excellent fruit in a comparatively short space of time. Before or almost simultaneously with that reorganization Germany had its golden age of pure philosophy. It produced masters of abstract thought—Leibnitz, Kant, Fichte, Schelling, Hegel—who stand below, yet beside, the giants of Greece—Socrates, Plato, Aristotle. Their works and their ideas profoundly influenced every department of thought and literature, and every branch of education. The result was that the system of legal education was on the Continent readjusted on a philosophic basis. This was evident even in the teaching of the Roman law itself. Gaius would with difficulty recognise what the Germans call *Institutionen*. Tribonian or Justinian would not know their own *Pandects*, as they are interpreted with rare skill by such writers as Savigny, Puchta, or Vangerow. No Roman lawyer would comprehend what the Germans call the *Encyclopædia*—the general introduction and survey of the various parts of legal education which the German Universities, following the example of Leibnitz, wisely provide as an introduction for the legal student.

But the change was still more palpable and beneficial in the general organization of the legal faculties of the Universities.

Retaining in what some of their own best lawyers and jurists of the present day deem an undue pre-eminence the study of the Roman law, they added to law not general history, like the English Universities, but those subjects which are either the true foundation or the proper parts of a well-organized system of legal study.

*First*, The Philosophy of Law, or, as it is sometimes called, the Law of Nature, which explains the relations between law and philosophy.

*Second*, The Law of the State—on the theoretical side Politics, a branch of philosophy which had been strangely neglected since the time of Aristotle, and on its practical side (*Staats Recht*) Constitutional Law, which by a valuable improvement has been recently divided into Organic and Administrative State Law.

*Third*, National or Municipal Law—the law of their own country, Civil, Criminal, Ecclesiastical, and the Law of Procedure.

*Fourth*, International Law—that latest development of the idea of justice which, while some have doubted whether it is entitled to the name of law and not of custom, forgetting that every municipal law also has one of its roots in custom, has, fortunately for mankind, established incontestably its claim to recognition as a branch of jurisprudence, though it may still be long before it enters upon its full estate.

The Continental Universities have received, as they have deserved, the reward of the faithful servant who has used his master's talents

instead of hiding them. They have during the last century educated not only professional lawyers, to whom they have given a more liberal training, but statesmen and the servants of the State; for by an easy adaptation of the system, chiefly by allowing a considerable amount of free option to the student to select those branches which were required for his future destination, that system is equally serviceable for the education of the advocate or judge, of the government official or diplomatist, or of the classes who are able to devote themselves to an unremunerative but honourable political career.

It has been the fate or fortune of legal education in Scotland, a small country, but one which has always been keenly alive to educational questions, to stand as it were half-way between the English and the Continental systems, influenced by both, but not as yet definitely accepting either. The time has come when it must choose between them. It is vital for the future of legal education in Scotland that it should follow the Continental rather than the English model. There are no insuperable difficulties to prevent it from doing so, though undoubtedly there are some prejudices to be overcome. The Scottish system has leaned sometimes towards the English, sometimes towards the Continental model, but its chief and latest inclination has been, as indeed its earliest inclination was, in the latter direction. The distinction between the two systems may be shortly expressed thus. The Continental system closely associates legal education with the Universities, the English system separates it from the Universities. The Continental system of legal education in the University is an organized and liberal training which is adapted not for advocates or professional lawyers only, but for all persons whose business in life leads them to require a knowledge of those subjects which relate to law and government. The English system of legal education, whether in or out of the University, is an unorganized system without any sound foundation or proper arrangement of its parts. It is not well adapted for the training of professional lawyers, and it is comparatively useless as a training for other persons who require a knowledge of law. In Scotland ample provision had been made for the teaching of the Canon and Civil Law in the original schemes of the University, as may be seen by consulting the foundations of Wardlaw, Elphinstone, and Turnbull. But after the Reformation, and indeed before the Reformation, this study declined. In the foundation of Edinburgh by James VI. naturally no notice was taken of it. Scottish lawyers received, as a general rule, their education in the chambers of practising lawyers and by attendance on the Courts; but the custom fortunately prevailed of the few who could afford it resorting to the Continental Universities, and this, together with the importance of the Civil Law to the understanding of many parts of the law of Scotland, led to the traditionary respect for that system never being lost. It was not till after the Union

in 1707 that the necessity of systematic legal education in connection with the University made itself felt, and then though the steps taken were somewhat slow they were sure and in the right direction.

This may be seen if we briefly trace the history of the School of Law in the University of Edinburgh, which is the chief school for students of law in Scotland.

In 1707 a Professor of Public Law and the Law of Nature and Nations was first instituted. The time had not come when the three separate subjects, the Philosophy of Law, Public Law, and International Law were clearly distinguished; but it was a good omen that the first step taken was to establish a chair whose duties related to law regarded as a liberal branch of education, and not merely a technical and local system.

In 1710 the Town Council of Edinburgh, "having taken into consideration the great utility of a public teacher of the Civil Law in their College, and that for want of such young gentlemen disposed to that study were obliged to go abroad to foreign Universities," appointed a Professor of Civil Law.

In 1719, on a similar preamble, the Town Council established a Professorship of Civil History, and Greek and Roman Antiquities. This was in imitation of the division of subjects which then prevailed in Holland, and undoubtedly was not the province we should now assign to a single professor. Still it was a step in advance. Unfortunately, also, the Town Council gave no endowment to the Professor of Civil Law, and a merely nominal and revocable one to that of History.

In 1722 a Professorship of Scots Law was for the first time instituted on the representation of Mr. Alexander Bayne, himself the first professor, "how much it would be for the interest of the nation, and of this city, to have a Professor of the Law of Scotland placed in the University of this city, not only for teaching the Scots law, but also for qualifying of writers for his Majesty's Signet." At this period, and for more than a century later, the Faculty of Advocates retained exclusively in its own hands the admission of its members, and admitted them on terms which were, as regards both examination and attendance on lectures, almost nominal. The examination of intrants which was deemed the most honourable was in the Civil Law till 1750.

In 1807, at the instance of Dr. Andrew Duncan, Professor of the Theory of Physic, a Professorship of Medical Jurisprudence was instituted at a time when there was no other establishment of the same kind in Great Britain. Neither of the English Universities have yet founded such a chair. What good service it has done, in the hands of the eminent men who have held it, both to lawyers and doctors is well known.

In 1825 the Writers to the Signet, with the liberality and public spirit which has distinguished that corporation, and gives it its



distinction much more than any of its exclusive privileges, established a Professor of Conveyancing.

Such is a brief account of the progress and formation of the Faculty of Law in the University of Edinburgh, to which it is only necessary to add that the Commission consequent on the Act of 1858 recognised the importance of Constitutional Law by recommending the Professor of History to make it the subject of his lectures.

All branches of the legal profession have thus shown their interest in regard to the study of law in the University by promoting the foundation of these various chairs, and in one case contributing to the endowment.

As regards graduation and attendance on the classes, not merely necessary, but beneficial for the liberal training of lawyers, the legal profession has, though more recently, been equally far-sighted and appreciative. Graduation had in law, as in other subjects, been, as a rule, unduly neglected by the Scottish Universities; but considering the lateness of its introduction as a general practice, the recognition it has received cannot be called tardy.

The degree of LL.B. (Bachelor of Laws) was instituted by an ordinance of the University Commissioners in 1862. In 1866 the Faculty of Advocates required attendance from its intrants on all the six departments of the Law Faculty prior to examination, and a few years later it recognised the degree of LL.B. as equivalent to its examination.

The degree of B.L. (Bachelor of Law) was instituted by her Majesty in Council in 1874. Its institution, or some change in the regulations as to graduation in law, was almost imperative, for the degree of LL.B. required that the candidate should have previously taken a degree in Arts. This was an almost insuperable barrier to many law students proceeding to this degree, for up to that time degrees in Arts had not been commonly taken by law students; and although now a larger proportion take the Arts degree, as it is certainly desirable they should when their time and means allow them to do so, it is not to be expected that there will not always be a considerable number who are not Arts graduates. The degree of B.L. is sometimes represented as being an inferior degree, and it is desirable to remove some misconception which exists with reference to it. As regards the privileges it confers, it is certainly not inferior, for both degrees make their holders members of the Council of the University, and so give them a right and duty to watch over its interests, to take part in its business, and to exercise its franchise. As regards honour, it is undoubtedly in itself not so high an honour as the degree of LL.B., which requires two additional subjects, and implies a wider range of preliminary education. But if it be compared with the standard for degrees in other faculties, the degree of Arts or the degree in Medicine, it is a degree which cannot be taken without honour. Fortunately, too, for those per-

sons specially solicitous of honour, who are prevented, from not having graduated in Arts, from becoming LL.B., it has been possible within the degree itself to give opportunities of distinction. The prize founded by the Forensic Society is awarded to the student who in each year passes with most distinction in four subjects, the number necessary for the B.L. degree. It has been more than once gained by a gentleman who has taken that degree. The law fellowship of £100 a year for three years which the University owes to the Endowment Association was thrown open to all persons who had taken either degree within five years prior to October 1879. The very able theses sent in when this fellowship was competed for, while it rendered the decision difficult, satisfied the Law Faculty that the law students were not behind the medical students either in the capacity or desire to gain honour by original work. It will be matter of much regret if the foundation of this fellowship is not made permanent.

It is pleasant to be able to add, as another of the advantages attending upon the degree of B.L., that the Court of Session by an Act of Sederunt have admitted it as an equivalent for the whole examinations at present required for admission as law agent, with the exception of the examination in practice. For this all persons interested in the education of the legal profession in Scotland, and the maintenance of a high standard of character and attainment in its largest branch, must be grateful. It is to be hoped that the gentlemen who take advantage of it will be careful to prepare themselves thoroughly for the examination in practice. They should feel that on this point the honour of the University and the degree is to some extent in their keeping. It would be unfortunate if it was possible to say that law graduates were less capable of passing in practice than those who were not law graduates. If it can be said, it will be said. It should not be overlooked that there are strong prejudices, and some, though not strong, reasons for disparaging University education as being impractical. There are persons who regard professors as men of theories and of crotchets, quite incapable of taking part in practical life, and a shrewd man of business has been known to describe a graduate as a person generally unfit for business. Every one in any way connected with a university should do all in his power to remove the reasons for this complaint by cultivating the business habits of punctuality, order, and precision, and by proving the practical value of liberal culture.

In doing what they have done the legal profession in Scotland has done all, or almost all, it could have done for the furtherance of legal education upon a liberal basis. It has, after deliberate consideration, associated that education with the Universities, which are permanent national institutions for the promotion of liberal culture, and has gradually organized it on a model which, though not so complete as the Continental model, is of a similar kind. It

has made it sufficient, and more than sufficient, for purely professional purposes. It would not be reasonable to expect it unaided to make it sufficient for national purposes. In what remains to be done there will not be, as in England, anything to undo. What remains to be done depends not on the legal profession, though its members may aid in the matter, but upon two powers which, powerful as the legal profession is, are still more powerful—Government and Public Opinion. Fortunately the latter is in our country the supreme power, for as regards Government we must confess with shame that no English statesman has ever understood what is due to the higher education. Some English statesmen have almost assumed it as a principle that the lowest education is exclusively entitled to the care of the State. But if public opinion in this country can be made aware of what the value to the nation is of providing for those who are to become its servants thorough education in those departments of law which relate to government, statesmen, who are only the highest servants of the nation, will obey their masters' orders. As regards the system of legal education in Scotland, it is not, after all, so much that requires to be done with a view to making that education as serviceable for the training of the servants of the State as the system of legal education is at present in every other country of Europe. It is not the foundation of many new professorships that is required. Germany has in this respect run into an extreme. At most two or three additional professorships in the University of Edinburgh—for example, (1) Constitutional Law, which the Commission has recommended to be separated from History; (2) International Law, which certainly ought to be separated from the Philosophy of Law; and (3) English Law, which ought long ago to have been introduced—and the placing of the Chair of Political Economy in the Law Faculty as well as in that of Arts,<sup>1</sup> would give ample teaching power. It is not even the grant of sufficient endowments for the existing chairs that is primarily required. This also the Commission has recommended, and no false delicacy should prevent the expression of the opinion that this object should take precedence of new foundations. What is chiefly required is two things. The first is, on the part of the University, an adaptation or division of the Legal Faculty so as to make one of its departments have special reference to the public service. A mere fragmentary Arts degree in law and history can never fulfil this object. A branch of the Law degree which would include the philosophy of law, international and constitutional law, and civil law, and one or other of the municipal laws of Great Britain, and political economy or medical jurisprudence, would, as has been proved on the Continent, well fulfil it. The other requisite is,

<sup>1</sup> This has already been done in the University of Edinburgh by resolution of the Senatus, and the institution of one of the Vans Dunlop scholarships of about £100 a year for three years, to be first competed for in the Winter Session of 1881, and to be awarded for proficiency in Political Economy and Mercantile Law, will operate in the same direction.

that on the part of the State there should be, as there has been already on the part of the legal profession in Scotland, a recognition of the value of such an education as tested by graduation as a mode of entrance to its service. In this there need be nothing of the nature of a monopoly, a name odious to English ears, and never more rightly odious than when it is applied to check the free career of talent. But there is no monopoly in allowing a special education for the service of the State tested by examination, varying of course as regards its different departments, to be one of the modes in which that service may be entered.

Before these objects can be attained, and indeed in order to attain them, there will be need to exercise a virtue which has been recommended to those who have a future before them—patience. Unfortunately this is a virtue which has to be possessed in still larger measure by those to whom no future is allowed. If we wish to belong to the former and not to the latter class, there is required, besides patience, effort, without which nothing considerable can be accomplished.

The end aimed at is not personal, professional, or local merely, but concerns the national welfare; for Great Britain will undoubtedly suffer even more in the future than it has done in the past if it allows those to whom it intrusts the management of its affairs to be less carefully trained for their arduous functions than the statesmen and other public servants of the Continental states. Æ. M.

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## ON THE CODIFICATION OF MERCANTILE LAW.

A PAPER READ AT THE SOCIAL SCIENCE CONGRESS, 11TH OCTOBER 1880.

THE subject of this paper, although far from being a novel one, is of such practical importance that it cannot be too often brought under the notice of social and legal reformers and of the public generally.

The great majority of lawyers qualified to express an opinion, and all those who are sincerely desirous of benefiting the community by simplifying the law and minimizing litigation, are agreed that it is to the form of a code that the laws of every advanced nation ought ultimately to be reduced. No one, I presume, doubts the desirability of a gradual assimilation of the laws of England, Ireland, and Scotland, the requirements of the three countries being now in most respects identical; but before this can be done the laws of each country must be carefully arranged and digested, in order that we may clearly understand what the law of each is before we proceed to amalgamate them. The English system in particular still contains many relics of barbarism. It is enormously voluminous and lamentably chaotic, and its principles have to be laboriously gathered from hundreds of commentaries and text-books,

thousands of statutes, and tens of thousands of reports; while even the comparatively simple law of Scotland lies buried in hundreds of ponderous tomes. To the expert the discovery of the rule of law which governs any given human relation is often a matter of difficulty, involving much labour and research, while in most cases it would be worse than useless for a layman to attempt the task. No doubt we already possess valuable text-books on every branch of the law, but these consist to a very great extent of historical, controversial, and speculative matter, obscured with technical terms, conflicting opinions, and copious references, bewildering to the uninitiated; and even if you succeed in finding the rule you seek, it will generally be found stated with considerable doubt and hesitation. After reading a hundred pages on the subject, you are probably told that if one set of decisions be reconcilable with another, and if Lord Westbury in one case can be held as concurring with Lord Brougham in another, and if a certain statute be susceptible of such and such an interpretation (though some authorities hold that is repealed by implication by a subsequent statute), then the rule would rather seem to be as follows, and may perhaps be stated thus: . . . Wearied, disgusted, and bewildered, are obliged after all to go to your solicitor, who recommends you to consult counsel; and the upshot of it all very likely is, that you are either badly advised or involved in litigation, and in any case the result is almost certain to be disastrous. Of his own system of law a recent English authority says that "it has no definitions, no rational distinctions, no connection of parts. . . . Few practical questions can be answered by a lawyer without a search into numberless Acts of Parliament and reported cases. To laymen, of course, the whole law is a sealed book. As there are no authoritative general principles, it happens that the few legal maxims known to the public, being apprehended out of relation to their authorities, are as often likely to be wrong as to be right" (Encyc. Brit.).

Let us now contrast this condition of our laws, and particularly those of England, with the legal systems of most other civilized countries. The whole of the leading principles of the civil law of Germany are comprised within the so-called "*Corpus Juris Civilis* for Germany and Austria," a compilation consisting of two moderate volumes, and costing about 7s. only. The concise and lucid, although in many respects defective, "*Code Napoléon*" can be carried about in the pocket; and hardly less portable are the more carefully drawn codes of Holland, Italy, Switzerland, Denmark, Sweden, and Norway. Superior in some respects to all of these are our own Indian codes, of which Macaulay was the illustrious originator, and which, together with various miscellaneous laws, are comprised in two volumes of moderate size. Of these volumes about 120 pages only are occupied with mercantile law, while Sir James F. Stephen's code of the law of evidence occupies no more than 40 pages. I may also here mention the same learned author's handy digest of



the English law of evidence, which might easily be reduced to still smaller compass, and Mr. Frederick Pollock's excellent digest of the law of partnership. None of these codes are so complete and perfect as to leave no room for dispute or for litigation; but their language is generally clear and unambiguous, and the Indian codes afford the great additional advantage of illustrations, so that any man of ordinary intelligence may apply the rules they lay down to the special circumstances of his own case; and it is certain that they greatly facilitate the transaction of every kind of business and prevent many a vexatious inroad on one's time, temper, and purse. In these codes a Frenchman, a German, and even a Hindoo will in all ordinary cases find in a few simple words the rule which the Englishman vainly sought to discover in his law-book, and even from his legal adviser. The fact is that, as a rule, we are utterly and hopelessly ignorant of the law under which we live; and, as Sir Henry Mayne tells us, you have only to cross the Channel to be convinced that even the humbler orders on the Continent have a fair practical knowledge of the law which regulates their everyday life.

I assume it then to be desirable that the whole British Empire should possess a single and uniform code of law. Each system would, of course, have to be purged of barbarisms and digested, and many substantive amendments would require to be made before the different systems could be consolidated and united; but the task would be greatly facilitated if, as has often been proposed, a beginning were made with mercantile law. Ever since the days of the ancient Phœnician merchants, or at least since the time of the famous "Consolato del Mare," the law-merchant of different nations has been far more uniform than any other branch of their law; and accordingly the differences between the mercantile law of England and that of Scotland are by no means very numerous or very serious. To point out these differences, and to show how they could be removed, formed the chief task of the Royal Commissioners appointed in 1853. In their second report, issued in 1855, they submitted about fifty-two practical recommendations, but of these about twenty-two only were adopted, and were embodied the following year in the English and Scotch Mercantile Law Amendment Acts (1856, c. 60, 97). The thirty remaining recommendations have been disregarded for the last twenty-four years; but in these days of enlightenment and reform it is surely our duty as a nation and as individuals to reconsider them, and to make some attempt to emancipate ourselves from the reproach of possessing the most cumbrous, unscientific, obscure, and expensive system of law in the civilized world.

I shall now enumerate briefly, avoiding minor points of detail, some of the chief differences between the mercantile laws in force on different sides of the Tweed, together with those recommendations of the Commissioners which have hitherto been disregarded.

1. *Sale*.—In Scotland a contract of sale may be proved by parole

evidence ; but in England, if the price be £10 or upwards, it can be proved by writing only, unless the bargain has been partly acted upon. This provision of the English Statute of Frauds (29 Ch. II. c. 3, sec. 17 ; and also of the Irish Act, 7 Will. III. c. 12, sec. 13) is obviously a serious fetter to commerce, and is therefore usually disregarded by mercantile men. The result is that most sales in England and Ireland are withdrawn from the protection of law altogether, and the dishonest trader can always plead the statute if dissatisfied with his bargain. In this case the Commissioners justly prefer the Scotch rule of law, and recommend the repeal of the sections referred to.

On the other hand, the English rule, that the payment of a price or the discharge of an obligation may be proved by parole, is obviously more just and expedient than ours, that it can be proved only by the writ or oath of the seller or of the creditor ; for if the debtor loses his receipt, a dishonest creditor may compel him to pay a second time. The Scotch rule is usually defended on the ground that witnesses may easily be mistaken as to the intention of one person in paying money to another ; and so they may ; but the English law of course requires clear and specific evidence of a specific transaction, and if the evidence leaves room to suspect any misunderstanding on the part of the witnesses, it is held insufficient. In this case the Commissioners prefer the wider English mode of proof.

Again, in the case of sales by auction, the law might advantageously be altered in both countries. In Scotland no seller can legally be a bidder unless by express reservation, while in England, unless the sale be expressly without reserve, the seller may employ one person to bid for him without notice to the other bidders. In Scotland, therefore, the seller is exposed to the risk of collusive agreements among bidders to abstain from running up the price with a view to share the profit of a purchase at an under-value, while in England the puffer employed by the seller may lead a *bond fide* bidder to offer more than the real value of the article. Both risks would be counteracted by allowing the seller to have a single bid, which would enable him to fix a low "upset" price to start with, but would prevent the article from being sold for less than its value. This rule would also probably ensure the sale of property at its first exposure, and obviate the expense and vexation of putting it up repeatedly at successively reduced prices.

Another well-known difference between the laws of the two countries relates to the sale of stolen goods. In England the original owner cannot recover them after they have been sold in market overt ; but in Scotland he is entitled to claim restitution from any *bond fide* purchaser. The English rule manifestly affords encouragement to thieves, especially in London, where every shop is held to be market overt. It may be said that a *bond fide* purchaser ought not to suffer ; but it is often difficult to ascertain

whether *bona fides* really exists, and on the whole it seems preferable to hold, with the Commissioners, that no man should lose his right to his own property without either his consent or his fault.

But the most serious difference between the English and the Scotch law of sale, which still exists, although the Mercantile Law Amendment Acts profess to have removed it, lies in our tenacious adherence to the old Roman rule—*traditionibus et usucapionibus, non nudis pactis, dominia rerum transferuntur*. In England, on the other hand, in America, in France, and I believe in almost every other civilized country, a completed contract of sale passes the property of specific goods sold, the Roman doctrine having been found unsuited to modern commercial requirements. The chief argument in favour of the Roman rule is that possession is the badge of property; but in the case of mercantile transactions, with which alone we are now concerned, the reverse is quite as often the case. In England goods sold, but not delivered, are the property of the buyer, while in Scotland they continue theoretically to belong to the seller. If, however, the buyer has paid the price, the Scotch Mercantile Law Amendment Act transfers to him and his creditors all the rights of proprietorship; but so long as he has not obtained actual possession, the law of Scotland declares the seller to be still the true *dominus* after all. In this instance, although the Commissioners rightly abstained from recommending the alteration of the general Scotch rule that delivery is required to pass property, they might at least have advantageously recommended its abolition *in re mercatoria*, as it is hazardous and contrary to sound principle to ingraft on an old rule new results which cannot naturally flow from it. As an example of this hazard I may here mention the case of *Wyper v. Harvey*, decided in the Court of Session on 27th February 1861, the soundness of which has frequently been questioned. On the other hand, in all non-mercantile cases the Scotch doctrine as to delivery seems preferable, as it prevents the occurrence of many difficult questions as to reputed ownership and collusive possession.

2. *Capacity of Minors*.—Passing from the law of sale to that of debtor and creditor, we here find a wide divergence between the laws of the two countries as to the capacity of minors. In Scotland any one above the age of puberty (*i.e.* above fourteen) may engage in trade, and legally bind himself and others. In England he cannot do so until he is over twenty-one, all persons under that age being infants in the eye of the law. An infant trader can get no credit; but if he succeeds in obtaining it from persons unaware of his infancy, he can easily repudiate all disadvantageous transactions by proving that he is under age. In this case the English law might usefully be assimilated to the Scotch, as the Commissioners recommend; or it might be still more desirable to abolish, *in re mercatoria*, the rigid line between minority and majority in both countries, and to make all persons

*de facto* engaged in trade, of whatever age, equally liable to fulfil their engagements.

3. *Suretyship*.—The laws of suretyship, to which we may next pass, are now fortunately almost entirely assimilated in the two countries. But it is to be regretted that in Scotland the discharge of a guarantee can still be proved by the writ or oath of the creditor alone, while in England it can competently be proved by parole evidence.

4. *Bills*.—Another important subject dealt with by the Commissioners is that of bills, the law relating to which is now practically the same in both parts of the island, except in several noteworthy particulars. (1) The remedies competent to bill-holders differ considerably in the two countries. In England payment can be enforced by action only, an expensive and tedious course, which moreover often affords an unscrupulous debtor loopholes for escape from his liability. In Scotland, on the other hand, payment is enforcible by summary diligence (Acts 1681, c. 20, and 1696, c. 36), *i.e.* the protest is registered in the books of any competent Court within six months of the non-acceptance or non-payment, whereupon a summary warrant for execution is issued, just as if a formal judgment had been pronounced by the Court. In this case the Commissioners recommend that some similar expedient should be adopted in England. (2) Another point of difference regards the mode of rebutting the presumption that a bill was granted for a consideration, and of proving the discharge of a bill. In Scotland the proof is limited in both cases to the writ or oath of the holder, while in England there is no such objectionable limitation.

5. *Law of Shipping*.—In the law of shipping, in the next place, there is one point in which the English law might perhaps be advantageously assimilated to the Scotch, although the Commissioners have not recommended any change. In England if the owners of a ship differ as to its employment, the majority rules, while the minority is only entitled to security for the value of their shares; but in Scotland the minority, or indeed any one partner, may at any time put an end to the joint-ownership (Stair, i. 16, 4) by offering alternatively to sell his share at a certain price, or to buy their shares at the same price, or by causing the vessel to be sold by public auction and the price to be divided.

6. *Partnership*.—Proceeding next to the law of partnership, we find there also several differences between English and Scotch law which it would be most desirable to remove. In Scotland a private partnership constitutes a distinct *persona*, fully capable of contracting, holding property, suing, and being sued, while in England it is not recognised as having any existence separately from the individuals of which it is composed. In England each partner *nominatim* must be made a party to all legal proceedings in which the firm is involved. A defendant sued by a firm may escape from liability by using a defence competent to him against

any partner as an individual; and any individual partner may gratuitously release the defendant from the obligation on which the action is founded. Serious complications, too, may arise when one or more partners are common to two different firms with conflicting interests. All such hardships and difficulties are avoided by the expedient of regarding the partnership as a jural *persona* with interests distinguishable from the private interests of the partners. In this respect, therefore, the Scotch law seems clearly preferable.

In Scotland, however, there is a peculiarity in this branch of law which ought to be removed. A creditor who has obtained judgment against a partnership may proceed with execution against any one whom he asserts to be a partner, no judicial proceedings being required to establish the fact; while in England the judgment can only be executed against partners named in it, or, in the case of public companies, against persons judicially ascertained to be partners. Here again the English system is manifestly the more equitable; but the difficulty would be most effectually removed by the establishment of public registers of partnerships, a system which has been found to work well in Germany.

To a Scotch lawyer, on the other hand, it seems anomalous that in England a partner cannot generally bind his firm by an instrument under seal, while in Scotland he can bind the company within its line of business in any manner in which he can bind himself. Another difference exists with regard to the retirement of a sleeping partner. In Scotland public notice of withdrawal is required to secure him against liability for subsequent transactions (a rule for which there seems no good reason), while in England notice to those correspondents who were aware of his connection with the firm suffices.

7. *Limitation*.—We may now briefly examine the subject of the limitation of actions, or, as it is usually called in Scotland, prescription; and there is perhaps no branch of mercantile law in which uniformity is more desirable, as the present conflict affords facilities to dishonest traders for evading their liabilities. The English six-years' limitation, applicable to almost all mercantile transactions, including bills, was introduced by 21 Jas. I. c. 16, sec. 3, while a twenty-years' limitation, applicable to testamentary documents, special covenants, and debts on bonds or recognisances was introduced by 3 & 4 Will. IV. c. 42. In Scotland, besides the forty-years' prescription, introduced by the Acts of 1469 (c. 28) and 1474 (c. 54), which extinguishes all obligations not enforced within that period, there are several other limitations concerning mercantile transactions which bar the remedy without extinguishing the right. First, we have the triennial prescription introduced in 1579 (c. 83), applicable to merchants' accounts, rent, and wages; then the quinquennial (1669, c. 9), with reference to bargains concerning moveables or sums of money; the sexennial, relating to



bills (12 Geo. III. c. 72, sec. 37); the septennial, limiting the duration of suretyship; and, lastly, the vicennial, relating to holograph letters and obligations. In all these cases, except that of the septennial prescription, the law of Scotland not unnaturally hesitates to declare the right extinguished, but limits the mode of proof to the writ or oath of the creditor. But the period to which the right of action is limited is in each case more or less arbitrary, and it might therefore be advantageously made uniform in every case with the English six-years' limitation. At the same time it would tend greatly to diminish litigation if the right were declared to be extinct upon the expiration of the six years, *i.e.* legally extinct; for an aggrieved party would not thereby be debarred from making a private appeal to the conscience of his adversary.

*Conclusion.*—In this necessarily imperfect review of the condition of our mercantile law there is little or nothing that has not been said before; but as the subject is one of great social importance, it deserves renewed consideration, and the public ought not to allow it to rest until they have effected some satisfactory reform. The experience of other nations has shown that a systematic and scientific code of law is a boon to the community at large, that it guides them unaided throughout all ordinary human relations and transactions, that it saves their time, labour, and money, and that it tends greatly to diminish litigation, and to promote the general harmony and happiness. In support of this statement it would be easy to multiply quotations from high authorities. Among numerous distinguished Continental names that of Savigny stands pre-eminent, and among English advocates for codification may be mentioned Bentham, Austin, Lord Brougham, and Sir Henry Mayne. Well worthy of perusal are the interesting prefaces to Sir James F. Stephen's "Digest of the Law of Evidence" and Mr. F. Pollock's "Digest of the Law of Partnership;" and all these authorities more or less emphatically concur in the old *dictum* of Bentham, "That he who has in the least degree succeeded in composing a code has done an immense good." As the first and easiest step towards the unification of the laws of Great Britain and Ireland, it is therefore surely our duty, and it is plainly for our interest as a nation, to digest, amend, assimilate, and codify our mercantile law.

J. K.

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## ACCIDENT INSURANCE.

THE cases on the above subject, of which *Winspear v. Accident Insurance Company (Limited)*, decided by the Exchequer Division in May last, is the most recent, do not so well repay the trouble of perusal and study as most series of cases, because the decisions depend so much upon the terms of the particular policy brought under the notice of the Court. Still these cases are not destitute of instruction, for, notwithstanding the differences in the wording

of the exceptions, which have been the principal subject of controversy, there are to be found many points of similarity, and there are some things which appear to be common to all policies, and indeed there has gradually sprung up something like an established form of policy.

There is one observation which we wish to make at the outset. Whatever risks may be held by the Courts to be covered by, or to be excepted from, the terms of a policy, the policy *ought* to cover the case of death or disability which would not have happened but for the accident. It does not matter whether the accident was the proximate cause, and some disease, epilepsy, for example, was the original cause, and led to the accident, or whether the accident was the primary cause, and some supervening disease was the proximate cause of death, the policy ought to cover the case. That is the real intent and object of such insurances, and it is on the faith of such cases being covered by the policy that people insure. It is intolerable, as happened in a case we shall have occasion to notice, that when a man gets a cut and death ensues from erysipelas resulting directly and solely from the cut, the insurance company should be found not liable because of some exception introduced into the policy, so obscurely worded as to be barely intelligible to skilled lawyers, and which certainly failed to convey to an ordinary person insuring the meaning which the Court afterwards put upon it. These exceptions which insidiously nibble at and fritter away the protection which the person insuring supposed himself to be obtaining are unfair. The tendency has been to amplify these exceptions. Thus, comparing the cases of *Fitton* and *Smith*, we find that after the decision in the former case, which was decided against the insurance company, the company took care to alter the terms of their policies. Comparing the cases of *Reynolds* and *Winspear*, we find that the same thing occurred after the decision against the company in the first of these cases. We shall very likely find a like course adopted in consequence of the decision adverse to the insurance company in the recent case of *Winspear*. Indeed, one insurance journal, after commenting adversely on that judgment, says that really the only practical effect of the case is to make the insurance company get a new form of policy. We cannot think that the insurance companies are wise even for their own interests in piling up these exceptions. People will not care to insure if it is left in doubt whether they will get the benefit of the insurance they are effecting, and for which they are paying, or whether it may not be filched from them by some insidious exception. People will be chary of paying premiums to an accident insurance company when they know that if they sustain an accident it is just a toss-up whether the accident is or is not one of a kind which entitles them to compensation. In short, these rather narrow attempts to get rid of liability destroy that sense of security which people desire, and expect, and require.

What is an accident? In Bliss's "Law of Life Insurance" several definitions are given, taken chiefly from the opinions of judges. It is better not to attempt to define the term, because it is sufficiently significant in itself, and more significant than any definition, and because every definition, at least any we have seen, is apt to be incomplete and to overlook some case which it ought to embrace. Some curious speculations, and indeed some fantastic refinements and over-subtle distinctions, are to be found particularly in the American cases on the subject. Thus in an American case cited in Bliss (second edition, p. 705) it was questioned whether, when a man was attacked by highwaymen and suffered injury, this could be called an accident. "Perhaps," it was said, "in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident." Human life is, we think, too limited to warrant the wasting of time in the discussion of such quiddities as this. The result may have been foreseen and foreknown by the highwaymen, but it was not by the insurer or the insured; and that is what we have to regard. The occurrence was an accident in the sense that we have to consider in relation to the subject-matter of inquiry. It was clearly one of the risks which a person insuring expected to guard himself against. Suppose some malicious person were to place an obstruction on a railway line by which the train was thrown off the track and a passenger was injured, no doubt there was design, and the result was foreseen and foreknown; but what man in his senses would say that this was not an accident to the train and to the passenger? In another case cited by Bliss (p. 707) it was held that rupture caused by jumping from cars or running hastily was not an accidental injury: "The jumping off the cars or running was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling, or slipping, or falling. There was nothing accidental in his movements any more than there was in his passing down the steps of the hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy or a hæmorrhage, a rupture of a blood-vessel in the head or in the lungs." With great deference to the opinion of the learned American judge, we think this is sheer nonsense. The jumping off the cars was not accidental; but it was an accidental means of injury. The case of a man having a stroke of apoplexy while walking on the street offers no analogy, because there is in such a case no connection between the two things—the walking on the street and the stroke of apoplexy.

There are some remarks by Lord Chief-Justice Cockburn on the question what comes under the term "accident" in the case of *Sin-*

*clair v. Maritime Passenger Assurance Company* (3 El. and El. 478, 30 L. J. Rep. (Q. B.) 77), one of the cases where the point of difficulty is whether the death is to be ascribed to accident or to disease. The company insured against "personal injury from or by reason or in consequence of any accident which should happen to him [the insured] upon any ocean, sea, river, or lake." The man got a sunstroke, to which he did not knowingly, and without adequate reason, expose himself, from the effects of which he died. The Court held that the death could not be said to have arisen from accident within the meaning of the policy. "It is difficult," said Lord Chief-Justice Cockburn, "to define the term 'accident' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident and injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major*, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental, unless at all events the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration) if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that in one sense disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes. In the present instance the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected, and so died. We think, for the reasons we have given, that his death must be considered as having arisen from a 'natural cause,' and not from 'accident,' within the meaning of this policy."

The question was raised in an American case, which did not come to a decision, whether freezing to death is an accident, or whether it did not come under the rule of *Sinclair's* case. Dr. Bean, an American gentleman, with two companions, guides and porters, ascended Mont Blanc. Immediately on reaching the summit they were enveloped in a furious snowstorm which lasted several days. They dug a grotto in the snow, but were all frozen to death. Dr. Bean was insured under an accident policy containing several conditions, *inter alia* that the injuries insured against were those from external, violent, and accidental means. Death in a snowstorm, we should say, was as much an accident as death by drowning. As regards the application of the rule in *Sinclair's* case, it may be said what is the difference between death caused by exposure to excessive cold, and death caused by exposure to undue heat? An acute writer in the *American Law Review* (vol. vii. 592), however, observes: "The effect of exposure to the heat of the sun is hardly analogous. Sunstroke is a specific disease, and is as positive an affection of the brain as apoplexy or paralysis. *Sinclair's* case and the *dicta* therein do not apply to death from atmospheric causes where no specific disease is produced."

The policy usually provides that the company is not to be liable unless the injury is caused by some "external and visible" means, or by some "external and material means," or (the exception getting more and more extensive with the advance of time and the increase of decisions against the companies) by some "external, material, and visible means." If the expression "external and *visible*" means were to be strictly construed, a number of cases which are accidents in the strictest sense would come under the exception. Suppose, for example, a man is suffocated by an escape of gas, or charcoal fumes, or mephitic vapours, he perishes by accident, but the means of injury are not visible. Sometimes this expression has been referred to as if it meant visible *signs* of injury. But clearly visible means of injury is one thing and visible signs of injury is another thing. The difference between them is the difference between cause and effect.

In the case of *Trew v. Railway Passengers' Assurance Company* (30 L. J. (Ex.) 218) the policy insured against death from "injury caused by accident or violence." No claim was to be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof should be furnished to the directors. The evidence was to the effect that the assured went to bathe in the sea and was not seen alive afterwards. His clothes were found on the beach. A body was found in the water at some distance from the place where he went in to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that the body was that of the assured. Of course this was a question of fact for the jury, and it was also a question of fact for the jury whether the man died



from drowning. Chief Baron Pollock directed a nonsuit on the ground that there was no evidence of the death of the insured or of an accident within the terms of the policy—a direction which was upheld by the Court of Exchequer. Chief Justice Cockburn, in giving the decision of the Exchequer Chamber, reversing the judgment of the Court below, said, “If the jury found that the man died in the water, they might reasonably presume that he died from drowning. There is no ground for supposing that he committed suicide. It is true he may have died from natural causes, as apoplexy or cramp in the heart; but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or from natural causes.” All this was a question of fact, and is of comparatively little importance. But the further question was raised, whether death from drowning was within the policy. It may surprise the reader to learn that it was strongly contended that it was not. On behalf of the company it was, to quote the words of Chief Justice Cockburn, “contended in effect that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy.” It appears to us that there was nothing to argue about here. There is nothing said about “external and visible injury;” it is “injury caused by external and visible means;” and water satisfies both conditions. The expression “external and visible means,” we should say, refers to the cause or agency, not to the effects on the body. If the contention were correct that death by drowning did not come within the policy because, there being no external injury, the condition that the injury must be caused by external and visible means was not satisfied, then the words “injury caused by external and visible means” must mean “injury caused by external and visible injury,” which is nonsense. The expression “visible,” whether referring to the “means” or the “signs of injury,” is not one which should be introduced into a policy of accident insurance. It excludes from the area of risks covered by the policy risks which a policy of that kind ought to cover. If to get the benefit of the policy there must be visible *signs* of injury, then the case of death from “shock” in a railway collision, which surely comes within the category of “accident,” is not covered. If to get the benefit of the policy there must be visible *means* of injury, then the case of death from an escape of gas, or charcoal fumes, or mephitic vapours, which may, and generally does, come within the category of “accident,” is not covered.

In continuation of the remarks above quoted in *Trew's* case, Lord Chief Justice Cockburn said, “That argument, [that where the cause of death produces immediate death without the intervention of

any external injury, the policy does not apply,] if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. *We ought not to give to these policies a construction which will defeat the protection of the assured in a large class of cases.* We are therefore of opinion that if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy." We do not quite follow the Chief Justice's reasoning in one passage here. It would result, his Lordship says, from the proposition that where the cause of death produces immediate death without the intervention of any external injury the policy does not apply, that it would not apply if a man fell from a house and was killed. But surely when a man falls from a house and is killed there is considerable external injury.

In *Martin v. Traveller's Insurance Company* (1 F. & F. 505), where the insurance was against any bodily injury arising from any accident or violence, "provided that the injury should be occasioned by an *external or material cause* operating on the person of the insured," and the insured got a strain by lifting a heavy weight in the course of his business, Mr. Justice Wightman left it to the jury to determine whether this was an accident substantially within the terms of the policy. The jury held it was.

The questions of greatest difficulty in this class of cases are as to cases where death results partly from accident and partly from disease.

In the case of *Fitton v. Accidental Death Insurance Company* (34 L. J. (C. B.) 28) the policy insured against cuts, stabs, concussions, etc., when accidentally occurring from material and external cause, where such accidental injury was the direct and sole cause of death to the insured or disability to follow his avocations; but there was an exception that the policy did not insure against "death or disability arising from rheumatism, gout, hernia, or other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury."

The insured died from hernia caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient. The Court held that the death was not within the exception. Mr. Justice Williams said, "It is to my mind merely a question whether the proviso at the end of the first condition, that the company does not insure against death or disability from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether 'hernia' is governed by the other words 'or any other disease or cause

arising within the system of the insured before, or at the time, or following such accident or injury.' Looking at the language of the policy, and taking the first condition altogether, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system." In other words, the exception referred to hernia arising within the system independently of the accident, and that even though the death might be occasioned by the joint action of the two causes; but it did not refer to a disease directly traceable to, and the result of, the accident.

In the case of *Smith v. The Accident Insurance Company* (5 L. R. (Ex.) 302), where a different decision was given, the terms of the policy were the same as in *Fitton's* case, except that instead of saying, "or other disease arising within the system," it said, "or any other disease or secondary cause or causes arising within the system." The assured accidentally cut his foot on the broken side of an earthenware pan. Erysipelas resulted and the man died. The erysipelas was due solely and exclusively to the wound in the foot, but for which it would not have happened. The Court of Exchequer (Channell, Martin, and Cleasby, BB., *diss.* Kelly, C. B.) held that the case fell within the exception, and the company was consequently not liable. Mr. Baron Cleasby said, "Of the general object of the condition there can be, I think, but little doubt. When an accident happens to any one, causing bodily injury, a variety of diseases may supervene, as to which it may be difficult to say whether death is caused by the disease or by the injury sustained. To prevent the necessity of inquiry, this stipulation has been inserted to protect the company from liability in the case of certain supervening disorders. The policy first provides for the accidents it is to cover—and these it enumerates—and then follows the proviso that the company do not insure against death from 'rheumatism, gout, erysipelas,' and so on. Now these words are somewhat difficult to construe properly, but the true construction seems to me to carry into effect what I conceive to be the object of the condition. Take the case of gout. That is a disorder connected with the constitution. It might in any case be caused or not by an accident, but very often it would be very difficult to say whether it was or was not so caused; and I think this proviso was intended to meet this difficulty. The same remark applies to erysipelas and to *hernia* also, for that too is, or may be, to a certain extent, constitutional. All these cases are provided for, and when they or any of them, as secondary causes, occasion death the policy is not applicable. It is unnecessary to deal with cases where death has been caused by diseases not enumerated among the secondary causes, such as paralysis resulting from the accident. I formed my decision on the disease of erysipelas being excepted in express words, and on its being in this case a secondary cause of death. With regard to the case cited (*Fitton's* case) it presents no difficulty to my mind. The condition there did not contain any reference to

‘secondary causes;’ and, moreover, the hernia which occasioned the death of the assured was instantaneously caused by the injury. It was, in fact, the immediate result of the injury sustained.” Chief Baron Kelly thought, as Mr. Justice Williams thought in *Fitton’s* case, which the Chief Baron considered not distinguishable from the one before him, that the effect of the condition was to exempt the insurance company from liability only in the case of the erysipelas being collateral to, and not caused by, the accident. We doubt very much the soundness of the judgment of the majority in this case of *Smith*. The remark of Mr. Justice Willes in *Fitton’s* case is, we think, very applicable here. His Lordship thought it was extremely important with reference to insurance that there should be a tendency to hold for the insured rather than to hold for the company, where any ambiguity arose upon the face of the policy. Here there was an ambiguity, at least it was not clear that the company were right in their contention that the erysipelas mentioned in the condition referred to erysipelas arising within the system, whether independently of the accident or caused by the accident.

It does seem monstrous to hold that no benefit is to be derived under the policy of insurance if the insured dies not from a wound, but from something which was extremely likely to result from the wound, which did result from it, and which resulted from it directly. If it is intended to exempt the company in such a case as this, the exemption should be expressed in language whose import is unmistakable. Surely it does not matter whether there are intermediate steps between the accident and the death, or how many there are, provided the death is the result of the accident. Take the case of a man receiving an injury and lockjaw follows, from which he dies. Is the assurance company not to be liable in such a case? Baron Cleasby says, “It is unnecessary to deal with cases where death has been caused by diseases not enumerated among the secondary causes, such as paralysis resulting from the accident.” We think, on the contrary, that we cannot shirk the consideration of other diseases not enumerated, and that it is very necessary to deal with these. Any rule laid down in regard to the case of one of the enumerated diseases must apply to the case of any of “the other diseases” not enumerated. The same judgment would have to be pronounced in the case of paralysis, if it comes under the category of “the other diseases,” and Mr. Baron Cleasby says that it does, as in the case of erysipelas; and consequently in laying down a rule in regard to one of the cases specially mentioned, care must be taken to lay down a rule which will hold good, all round. “I found my decision,” he adds, “on the disease of erysipelas being excepted in express words,” etc. So far as he founds his decision on that, he builds his house upon the sand. The decision, whatever it is, ought to be based on the fact that the disease is excepted; not on the fact of its being excepted in express words.

According to Baron Cleasby in the observations above quoted, the case of *Smith* differed from that of *Fitton* in two respects. First, the words "secondary cause or causes" were in the policy in *Smith's* case while they were not in the policy in *Fitton's* case. No doubt these words were inserted in the policy because of the decision in *Fitton's* case, and were intended to protect the company from liability if such a case should occur again. We have, however, nothing to do with what was intended by the insertion of the words; we have only to regard what was effected by the insertion of the words. The expression "secondary cause" may at first sight be thought to mean something resulting from the original injury, the primary cause of the death or disability. But the context shows it does not. The condition speaks of "secondary cause or causes arising within the system *before*, or at the time, or following such accidental injury." Now, as the secondary cause referred to is one which may arise within the system *before* the accident, it is clear that it does not necessarily mean a cause resulting from the accident. The expression rather points to a co-operative and collateral cause. The impression from the use of the term "secondary cause" being thus removed, wherein do the terms of the two policies differ? The term "disease" is used in both, and hernia and erysipelas come under that description. But, indeed, both hernia and erysipelas are mentioned in express terms in both policies. Then it is said that in *Fitton's* case the hernia which occasioned death was instantaneously caused by the injury. What does that matter? It is said that it was part and parcel of the injury. But is the being or not being part and parcel of the injury dependent upon the moment of time when the disease arises? Whether it is hernia that ensues immediately upon the accident, or erysipelas, or lockjaw, which do not make their appearance until after the lapse of some days, the disease follows from, and is directly traceable to, the accident. It is to be observed, too, that hernia, if it is to ensue at all, is likely to ensue immediately, while erysipelas does not and cannot. If the instantaneous sequence of the diseases mentioned in the condition is to determine the applicability of the condition, then the assurer would be protected in almost no case of one of the excepted diseases, hernia, and in all cases of another of the excepted diseases, erysipelas.

In considering the effect of a case as a precedent, we have to consider not so much what was decided as what were the grounds of the decision. Now, Mr. Justice Williams clearly laid down that the condition protected not against the excepted diseases generally, but against these diseases arising within the system independently.

If it had been intended to exclude diseases like erysipelas, however originated, whether resulting from the wound or not, it would have been easy to have said so. Indeed all that would have been needed would have been to stop short at the word erysipelas. Why add the words "arising within the system," etc.? Some



meaning is to be given to these words, and the meaning ascribed by Chief Baron Kelly is a reasonable one, and is consonant with the real purpose of such a policy.

In the case of *Reynolds v. Accidental Insurance Company* (22 L. J. 820) the policy provided that there should be no claim against the company "unless such death or injury shall be occasioned by some external or material cause operating upon the person of the said insured." The man insured went into the sea to bathe, and while in a pool one foot deep, from some unexplained cause, became suddenly insensible, and fell into the water and was drowned. The condition of the body showed that he had breathed after his fall. It was argued that the company was not liable, the death being the result not of the accident of falling into the water, but of the fit. The Court held the company liable. Mr. Justice Willes said, "In this case the death resulted from the action of the water on the lungs, and from consequent interference with respiration. I think that the fact of the deceased falling in the water from sudden insensibility was an accident, and consequently that our judgment must be for the plaintiff." The writer of the article in the *American Law Review* already cited says, "It has always been the custom of American companies to regard such death as accidental, and the question has never been before any American court of final jurisdiction. So where an accidental wound caused the insured to fall into the water and be drowned, the death was accidental" (*Mallory v. Traveller's Insurance Company*, 47 N. Y. 52).

In the recent case of *Winspear v. Insurance Accident Company (Limited)* (42 L. J. 900), by the policy of insurance the defendant company was bound to pay £1000 if the insured should sustain "any personal injury caused by accidental, external, and visible means within the intention of the policy and its provisions," and the direct effect of the injury should occasion his death within three months from the happening of the injury, and it was provided that "the insurance should not extend to . . . any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease, or any medical or surgical treatment or operation rendered necessary by disease; or to any death arising from disease, although such death may have been accelerated by accident." The network of exceptions here is very widely extended. The insured while crossing a brook was seized with an epileptic fit, fell down in the stream, and was drowned. He sustained no personal injury to occasion death other than drowning. That the death was due proximately to accidental, external, visible means was perfectly clear, because it was not disputed that the man died by drowning. But what the insurance company relied upon was the exception of "any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease." In *Reynolds'* case, where the same company were the unsuccessful defendants, the policy did

not contain this exception. Indeed the exception was introduced into the company's policies immediately after, and in consequence of, the decision in *Reynolds'* case. The argument from these words is remarkably strong. If a workman from exhaustion, the result of disease, loses his balance, falls from a building, and is killed, surely that is an injury, we shall not say *caused* by, but *arising from* exhaustion consequent upon, disease; and if a man takes an epileptic fit, in consequence of which he falls into the water and is drowned, surely that is an injury *arising from* disease. The words "caused by" may raise the question as to whether the cause referred to is or is not the proximate cause. But the words "arising from" do not, as it seems to us, raise that question. These words are very comprehensive and far-reaching.

The Exchequer Division (Kelly, C. B., and Huddleston, B.), however, held the company liable. The Court evidently thought the question turned upon the meaning to be given to the word "cause" in the policy. Was it the proximate cause that was meant? If it was, the company was liable; if it was not, the company was not liable. The Court held the cause intended was the proximate cause. Chief Baron Kelly said, "Had death arisen from one cause—for example, from disease—and that disease had been preceded by another cause, and that one by another more remote, and that again by a fourth cause remoter still, we must still have looked at the final actual cause, the *causa causans*, as logicians term it. What, then, was the *causa causans* in the present case? . . . The real *causa causans* in this case was the influx of water into the deceased man's lungs, and the consequent stoppage of his breath, and so he was drowned. Anything which led to that, such as his being, if he were, subject to epileptic fits, or being seized with a fit while crossing the stream, would be a *causa sine qua non*. If he had not had the fit he probably would have crossed the stream in safety, but that does not make the fit the *causa causans*, the actual proximate cause of his death." The learned Chief Baron added, "The question then comes, is drowning a cause of death within the meaning of this policy?" There is, it appears to us, really no further question in the case. If the cause to be looked at is the proximate cause, then it is clear that the company was liable, because drowning was the proximate cause, and the injury which resulted in death was caused by accidental, external, visible means. Baron Huddleston agreed with Chief Baron Kelly after some hesitation. He said, "It has been held in *Trew's* case on a similar policy, that drowning is an 'injury' caused by some outward and visible means, and so is within the policy. It is clear that, if a man is drowned, there would be outward and visible means by which the directors could ascertain that he died in consequence of the drowning."<sup>1</sup> That death by drowning comes within the policy

<sup>1</sup> The learned judge here apparently falls into the mistake of supposing that by "means" is to be understood "signs."

is sufficiently clear—so clear that one cannot help wondering why any judge should trouble himself to spin a yarn about it. The learned judge, however, proceeds to consider what is the real and only point in the case. He refers to the exception of “‘an injury caused by or arising from natural disease,’ by which, I understand, it is meant that the injury or death must be caused directly by, or arise directly from, the natural disease; as, for example, in the present instance, if the case [a Special Case had been laid before the Court] had found that the insured had died from an epileptic fit, that would not have been within the policy, because it would have been ‘an injury caused by and arising from natural disease, or weakness or exhaustion consequent upon the disease.’” It appears to us that if a man died from an epileptic fit, that would not have been within the policy, not because it was an injury caused by or arising from natural disease, but because it was not an injury at all. If a man dies from an epileptic fit, he does not die from an injury caused by disease; he dies from disease. The words “arising from natural disease” must mean something. If they do not cover a case like the present, it is difficult to see to what they apply. It appears to us that this case of *Winspear* is just one of the very class of cases to which these words were meant to apply.

We have given the import of and have criticised the most important cases with reference to accident insurance. To complete the subject we may here briefly note two or three other decisions. In *Shilling v. Accidental Death Insurance Company* (2 H. and N. 42) it was held that an accident insurance was within the statute 14 Geo. III. c. 48, sec. 2, and like any other insurance on lives, must rest on an insurable interest in the real payee of the policy. In this case, although the policy was payable to the deceased, and the action was brought by his administratrix, as the policy was really for the benefit of another person who paid the premiums, it was held not valid. In the same case was decided a question about representation. The proposal which formed the basis of the policy contained a declaration that the insured was not subject to epileptic or other fits, and that there was no circumstance or information touching his habits of life with which the directors ought to have been made acquainted, as rendering him peculiarly liable to accident. It was held by Erle, J., that the circumstance that the insured was badly ruptured, and was subject to “swimmings and faintings” in which he was apt to fall down, were not circumstances which rendered him peculiarly liable to accident, and which therefore ought to have been communicated. In *Hooper v. Accidental Death Insurance Company* (5 H. and N. 546, 29 L. J. (Ex.) 340), in regard to the question what amounts to total disability, it was held that a solicitor who had sprained his ankle, whereby he was prevented from coming downstairs to his office and otherwise attending to his ordinary professional and

official business, although he was able to do some amount of business, for example, to write letters, had sustained an injury of the kind mentioned in the policy, viz. one "of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits." It was argued that if he had been a dancing-master, it might have been held that he was totally disabled. To which the Court replied that even a dancing-master who had sustained an injury which deprived him of the use of his legs would still be able to do something in the way of his profession. If he could not dance, he might play an instrument and teach others how to use their limbs in dancing; and an attorney prostrate, deprived of sense and motion, might to some extent by partners and clerks carry on his business. The Court held that if the insured was wholly disabled from carrying on his business as he usually carried it on, the company would be liable. The judgment was affirmed in the Exchequer Chamber. A different judgment was given in an American case, *Sawyer v. The United States Casualty Company* (8 Am. Law Reg. N. S. 233), where, after a discussion of *Hooper's* case, it was held that, in order to be regarded as "totally disabled from the prosecution of his usual employment," the assured must be deprived of the power to do to any extent substantially all the kinds of his usual labour. We think the American decision is right and the English one is wrong. Nothing is said in the policy about carrying on his business as he usually carried it on. It is carrying on his usual business. If a man is able to carry on his usual business to any extent, that is not a total disablement. In *Theobald v. Railway Passengers' Assurance Company* (10 Ex. 45) it was held that an accident sustained in leaving a railway carriage was a railway accident. The plaintiff, said Chief Baron Pollock, "was doing an act which as a passenger he must necessarily do, for every passenger must get into a carriage and out of the carriage when the journey is at an end, and he can hardly be considered as disconnected with the carriage and railway, and with the machinery of motion, until the time when he has safely landed, as it were, from the carriage and got upon the platform." In *Braunstein v. Accident Insurance Company* (31 L. J. (Q. B.) 17), where the policy conditioned that proof satisfactory to the directors should be furnished of the death or disability, "together with such further evidence and information as the directors shall think necessary to establish that claim," it was held that this meant such further evidence as the directors may *reasonably* require. In the Irish case of *Gamble v. Accident Insurance Company* (Irish Rep. 4 Com. L. 204) it was held that a condition of the right to recover, that a notice specifying the particulars of the accident should be delivered at the chief office of the company within seven days after its occurrence, was a condition precedent. The insured was drowned, and it was impossible for his representatives to give notice in time. Still, all benefit under the policy was lost. The rule was

held to apply, that when a person by the contract imposes a duty upon himself, he is bound to fulfil it. The imposition of the duty is his own voluntary act. It is different from the case of a duty being imposed by law which the person is prevented from performing, in which case the involuntary failure may be excused. (See on this subject *London Guarantee Company v. Fearnley*, 28 R. W. 893.) A condition of this kind may be invidious enough in an ordinary policy of insurance, but its insertion in an *accident* insurance policy, at any rate, insistence upon it except in some very peculiar circumstances is not so much inexpedient as grossly iniquitous. In many cases the accidental death may not be discovered until long after the seven days; and in the case of non-fatal injuries, the injury may be so severe as to incapacitate the assured from giving notice or attending to any other business. In the case of *Martin v. Traveller's Insurance Company* (*supra*) it was held that the measure of damages in the case of disability is not the proportion which the injury bears to the sum payable for loss of life; and further, that the assured can recover only for the personal pain and expense, not for loss of time or loss of profits occasioned by the injury. (See also *Theobald v. Railway Passengers' Assurance Company*, *supra*.)

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## Obituary.

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### LORD ORMIDALE.

IN our last issue we announced the retirement of this venerable judge, and expressed a hope that he would be spared for a considerable time to enjoy a peaceful old age. This hope however has not been destined to be fulfilled, as we have now to chronicle his death, which took place but a few days after the lines referred to were penned, on the 3rd of last month.

Robert Macfarlane was born in Dumbartonshire in 1802; he eventually entered the office of the late James Greig, W.S., in Edinburgh, as an apprentice. In 1827 he passed as Writer to the Signet, and for about ten years continued to practise as an agent. It was during this period that he wrote a Treatise on the Practice of the Court of Session in Jury Causes, a work which brought him into considerable notice, and no doubt had the effect of bringing a large amount of business when he came to the Bar. This somewhat unusual step he took in 1828, but the result amply justified the proceeding, for in a short time he took a leading place amongst the counsel then in practice. Although making no pretensions to the eloquence which in popular opinion is the most distinguishing characteristic of a good jury pleader, he soon showed that in



Scotland at least it was the heads of a jury to which it was more expedient to appeal than their hearts. The consequence was that owing to application to business, natural shrewdness, and common-sense, few counsel ever had such a large jury practice at the Scottish Bar. Those were the palmy days of trial by jury, and Mr. Macfarlane had ample opportunity of displaying his talents and making his way in the profession. In 1853 he was appointed Sheriff of Renfrewshire, and in 1862 he accepted the offer of the gown vacant by the death of Lord Wood, and was raised to the Bench under the title of Lord Ormidale. Having occupied this position for upwards of eighteen years, it is chiefly as a judge that the present generation of practising lawyers knew the learned gentleman. Few judges were more popular when in the Outer House than Lord Ormidale. It was his fortune to be a long time a Lord Ordinary, as it was not for twelve years that he was removed to the Inner House. During all that time his rolls were invariably well filled, jury causes, as might have been expected, forming a large proportion of the cases before him. But in whatever he was engaged no suitor had ever to complain that his case did not get a patient hearing, or that full consideration was not given to it in all its bearings. He had a high sense of the responsibilities and duties of a judge, and looked upon his office as a distinction, and to his work as something which demanded and got all his care. Unfailingly courteous in manner, and with a kindly Scottish humour which displayed itself not unfrequently but always at fitting moments, he was yet thoroughly natural and unaffected. No one ever spoke an unkind word about Lord Ormidale, and if ever a good-natured joke was made at his expense it was with the full assurance that the old judge was able to give quite as good as he got. How his loss will be felt by his brother judges is well exemplified by the fitly-chosen sentences pronounced by the Lord Justice-Clerk at the first meeting of the Second Division after his death. The Court of Session owes him much; it was his famous address to the Juridical Society which more than anything else tended to the remodelling of the procedure of the Court, which was put into practice by the Act of 1868. To the Bar he was always a good friend, and did not forget in the calm atmosphere of the Bench that he too had once been amongst the foremost in forensic strife. To junior counsel he was invariably kind; no newly-fledged advocate was ever at his bar struck dumb with sarcasm or overwhelmed with rebuke, but, on the contrary, he was sure to get whatever assistance lay in the judge's power.

And now, with this poor tribute to his memory, we must say farewell. The roll of the Scottish Bench may have contained names of greater lawyers or more distinguished orators, but for solid attainments, practical sense, and attention to duty, none will surpass that of Lord Ormidale. In those days when life is lived so rapidly, and one occurrence succeeds another without breathing-

space between, it is too often the case that when a man, eminent though he may have been, drops out of the ranks he is speedily forgotten: the ranks close up and the march of life goes on as if he had not been. Perhaps, then, the best testimony to Lord Ormidale's power of usefulness and distinguished qualities as a judge is what has been said since his death by many—that he will be *much missed*.

JOHN N. DYCE, Esq., Advocate.—The death of this gentleman is announced as having taken place on the 19th ult. He was called to the Bar in 1843, and for many years had filled the office of Sheriff-Substitute of Lanark. His duties were performed in an unostentatious but efficient manner up till a few weeks ago, when he resigned his appointment. At the commencement of the proceedings of the Sheriff Court at Lanark on the 22nd ult., Sheriff Birnie, who presided, made a statement with reference to the late Sheriff Dyce in the following terms:—

Although here only temporarily until an arrangement is made for the judicial business of this district, you would think it unseemly were not some reference to be made to the death of Mr. Dyce, which happened last Friday. Mr. Dyce was one of the oldest Sheriff-Substitutes in the country, and by many years the oldest Sheriff in Lanarkshire. He became a member of the Bar in 1843, thirty-seven years ago. For some years previously he served in the army, and for thirty-one years he was Sheriff-Substitute of this district. The office of a local judge is at all times difficult, cut off as he is from frequent personal communication with the centres of legal thought, and from consultation with his neighbours on cases before him for decision. He can hope to bring little more to the discharge of his duties than patient labour and unbending impartiality. These qualities you will claim for Mr. Dyce; and you will claim this further, that the ripe knowledge and experience of a long life enabled him with few exceptions to give sound and just judgment. He will be remembered as one who strove to do his duty as a gentleman and a judge. A stranger in this Court, I am not entitled to say more, or to ask to be permitted to join in that deep sympathy for Mrs. Dyce and her family which I know you feel, and which you will no doubt take a more fitting opportunity of expressing.

Mr. William Annan, on behalf of the Bar, replied in the following terms:—

My Lord, in the absence of Mr. Morrison, the senior member of the Bar, the duty devolves upon me, and with the approval of my brethren now present, to reciprocate on their behalf the kind sentiments which your Lordship has been pleased to express in reference to the death of our late Sheriff-Substitute, Mr. Dyce. The removal of a public man at any time is a subject of general interest, but that interest is intensified when we have to contemplate the removal of one whose functions brought him into close contact with ourselves for over thirty years. To a judge it is given oftentimes to displease or offend one or other of the parties whose causes he has to try, but I am sure I speak the feelings of all present when I say that Mr. Dyce brought to the discharge of his duty a diligence and painstaking second to none. And while we grant that there is no perfection in any man here below, at the same time I claim for our departed Sheriff a strong desire to do right, and that he brought to the decision of his cases a strong sense of justice. I trust your Lordship will accept

these few and imperfect remarks as a small tribute to the departed. Our sympathies with his family will doubtless find expression in another form.

THOMAS T. STODDART, Advocate, died on the 22nd November. The deceased gentleman was called to the Bar in 1833, but never practised. His name, however, will long be had in remembrance as the great authority on Angling in Scotland.

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### The Month.

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WE believe it is not the intention of the Government to fill the vacant Sheriff-Substituteship of Lanark, but that its duties will be distributed among the other Sheriff-Substitutes in the county.

This is an æsthetic age, so we suppose we must not grumble; but the frequenters of the Parliament House have really some right to be jealous of the artistic mantelpiece which was so handsomely presented last spring to adorn the central fireplace. The consequence of its erection is that the fire, which formerly presented a noble expanse of glowing coal, and had enormous heating powers, has now shrunk to a diminutive flicker of about a third of its former dimensions. A larger fire would, it was supposed, have a tendency to render the woodwork of the new mantelpiece inflammable, if not actually to ignite it. But it is hard when the thermometer is ten degrees below the freezing-point to look at that feeble flame and recall the memory of that glorious blaze which erstwhile showed its cheery face there. There—we have grumbled, though we do not suppose anything will be done, although the removal of the mantelpiece to some position where its carvings could be seen would be of immense advantage to itself.

Lord YOUNG and Lord MURE will open the Winter Circuit at Glasgow on Monday the 20th inst. Mr. J. J. Reid is Advocate-Depute in the Old Court, and Mr. A. E. Henderson occupies the same position in the New. Mr. Horace Skeete is Clerk of Court.

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## The Scottish Law Magazine and Sheriff Court Reporter.

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### SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

WHYTE v. PATON AND OTHERS..

*The effect of an extract on further procedure.*—This was an action of interdict. After litigation the interdict was refused and the pursuer found liable in

expenses. The defenders extracted the decret assolving the defenders from the conclusion for interdict, and which extract contained the remit to the Auditor, but contained no precept. The defenders afterwards obtained an account of expenses taxed, and moved for decree in the agent's name. It was objected that the decree of absolvitor being extracted the action was exhausted, and no further decree could now be given. The objection was repelled by the following interlocutor:—

“*Perth, 14th September 1880.*—On the defenders' motion, and their account of expenses having been taxed at £22, 1s. 3d., Decerns against the pursuer for that sum, and allows the decree to go out and be extracted in name and instance of John Stewart, solicitor, Perth, agent and disburser of the defenders for the said sum: And the pursuer having objected that the defenders had extracted the interlocutor of 4th August last, repels the objection.

“HUGH BARCLAY.

“*Note.*—The pursuer's solicitor objected that the defenders having, as he said, extracted the interlocutor of 4th August last, the case was exhausted and no further decree could now be given for the expenses. It was certainly unfortunate that what was called an *extract* of that interlocutor should have been taken out, but such was quite incompetent and useless. No decree can be extracted but a final decree, and any decree pending an action must be expressly allowed by the Court to be extracted *ad interim*. There was no such authority given in the interlocutor of 4th August, and therefore no material existed for an extract. The case was exhausted on the merits, but the interlocutor expressly provided for the expenses being ascertained. Where a decree condemnatory or absolvitor is given and extracted, it is incompetent thereafter to proceed for expenses. But in this case the extract could not be, and was not, followed by any executorials. The so-called extract was a mere official copy of the interlocutor, and actually remitted to the Auditor to tax the account of expenses, and had no precept for execution. The pursuer's solicitor attended the audit without raising the objection. The pursuer can show no loss or prejudice by reason of the official copy; but the defenders sustain serious loss were the pursuer's objection now sustained. H. B.”

*Act.*—Chalmers.—*Alt.*—John Stewart.

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Sheriffs BARCLAY and MACDONALD.

FORD v. PATERSON.

*Debts Recovery Court—Jurisdiction—Bill.*—This was an action in the Debts Recovery Court. It was for an account of groceries, but contained an item of a bill, whilst on the other side certain payments were credited, the amount of which extinguished the bill. A preliminary objection was taken that it was incompetent to sue for the contents of a bill in the Debts Recovery Court. This objection was sustained by the Sheriffs by the following interlocutors:—

“*Perth, 15th September 1880.*—Having heard parties' procurators and made avizandum, Finds that the account sued for, containing an item of a bill due on 4th August 1874, the same is incompetent in the Debts Recovery Court: Therefore dismisses the action, reserving all competent remedy, and finds the pursuer liable to the defender in . . . of expenses, less the sum of incurred in the reponing.

HUGH BARCLAY.

“*Note.*—The Debts Recovery Act is expressly designed for traders' open accounts, and expressly so limited. There can be no doubt that it is incompetent to sue for a bill *per se*. The pursuer's solicitor argued that the bill being for grocery goods, therefore it formed a valid item in an account for such goods. It does not appear that such is the case, and the passbooks produced show the reverse. Whatever was the value given, the debt was already constituted by bill. The singular circumstance is that according to the account

the bill was wholly paid by different sums thereto applied, and therefore should not have appeared in the account. The bill is not produced as a voucher, neither was it given to the defender, but is admitted to be still in the hands of the pursuer. At the date of the action it could have been enforced either by the pursuer or an onerous holder. Seeing that the bill is settled, the Sheriff-Substitute at one time thought he might avoid the objection by deleting the bill on the debit side of the account, and the credits applied thereto on the other side. This certainly would have been an extraordinary interference in the Court to amend the whole grounds of action. The blunder is the more unfortunate as it is now understood the defender admits the balance due as the account. H. B."

On October 25 the Sheriff adhered to the interlocutor.

*Act.*—John Young.—*Alt.*—Mitchell.

## DEBTS RECOVERY COURT, KILMARNOCK.

Sheriff COOPER.

BLACK v. COOK.

*Proof—Verbal submissions and awards.*—In this action pursuer sued defender for "sums awarded" by certain referees appointed by the parties to the pursuer as his share of the value of the stock of a garden in West Kilbride. The defender pled *inter alia* that the alleged submission and award having been verbal can only be proved by the defender's oath, and the Sheriff-Substitute pronounced the following interlocutor:—

"Kilmarnock, 20th October 1880.—The Sheriff-Substitute having heard parties' procurators, Finds that the submission and award founded on are verbal, and can only be proved by reference to the oath of the defender, therefore appoints the 3rd day of November next as a diet for taking the reference.

"W. S. COOPER.

"*Note.*—There are certain cases, such as submissions *inter rusticos* regarding matters of small importance, where proof by parole is allowed (Dickson on Evidence, 1st ed. vol. i. p. 309), but the present case does not, in the Sheriff-Substitute's opinion, fall under the exception. The parties here do not appear to be *rustici* in the proper meaning of the word, and the sum in question is much above £8, 6s. 8d., which may be taken as the measure of a sum of small importance. W. S. C."

*Act.*—Fleck.—*Alt.*—Kirkhope.



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